American Bar Association Journal

March 1954

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The President's Page

William J. Jameson

■ The American Bar Research Center is already a going concern—organized and functioning well in advance of the completion of the splendid new building which will house its activities.

We are most fortunate in its leadership. John Cobb Cooper, who has served as Chairman of the Research and Library Committee in the initial planning, has accepted appointment as the first Administrator of the American Bar Research Center. Robert G. Storey, immediate past President of the American Bar Association, has agreed to serve as Chairman of the Foundation's Research and Library Committee. Ross L. Malone, of Roswell, New Mexico, a member of the Board of Governors of the Association and of the Executive Committee of the Foundation, is the new member of the Research and Library Committee. The other members of this Committee are Associate Justice Robert H. Jackson of the United States Supreme Court; Chief Justice Arthur T. Vanderbilt of New Jersey; Dean Albert J. Harno of the University of Illinois College of Law; Herbert W. Clark, of San Francisco; and Carl B. Rix, of Milwaukee.

Mr. Cooper is particularly well qualified to assume the important position of Administrator of the research program. He has had a distinguished career, both as a practicing lawyer and administrator. Formerly President of the Jacksonville, Florida, and the Florida State Bar Associations, he was Vice President of Pan-American Airways from 1934 to 1946 and a member of the Institute for Advanced Study at Princeton from 1946 to 1951. He wrote *The Right to Fly*, published in 1947, and numerous articles dealing with international air law. Since 1946 he has been legal adviser to the International Air Transport Association and since 1951 Director of the Institute of International Air Law at McGill University, Montreal.

Mr. Cooper has made a most significant contribution to the American citizenship program of the Association. From 1949 to 1953 he was Chairman of the Standing Committee on American Citizenship and founded and edited its *Citizenship Quarterly Bulletin*.

Of the two buildings comprising the American Bar Center, one will provide headquarters for the ever-expanding program of the Association. The other will be devoted to the research program and will house a library which will include bar association publications and materials, legal periodicals and appropriate reference books, all available for research and also for bar associations and the practicing lawyers throughout the country.

Important projects of the Research Center are already under way. First, through the co-operation of the law schools, the proposed "Research Clearing House" has made substantial progress. Mr. Cooper has collected information with respect to more than 1000 legal studies completed at law schools, available in their libraries but never published or included in any list of available legal material. This list will be augmented as additional replies are received. The items will be classified and the information distributed in bulletin form to libraries, law schools and others interested, thus greatly adding to the knowledge of past legal research. The same procedure will be followed as to current or planned legal research, thus assisting in the correlation of research and avoiding wasteful and unnecessary duplication of effort in this field.

Second, as a result of letters to over 1400 bar associations, the Research Center has already assembled information regarding existing materials, and the extent to which duplicates are available or must be made. The co-operation of state and local associations has been most gratifying. Already, many publications have been provided and will be shipped as soon as the new building is completed.

The major objective of the American Bar Research Center will, of course, be the conduct of legal research required by the needs of the organized Bar. It will act as a service center for the Sections and Committees of the American Bar Association and affiliated organizations, providing the technical assistance needed in solving the problems of the practicing lawyer.

Substantial progress will be made this year in the first and one of the most important of the contemplated research projects. A Special Committee, of which Mr. Justice Jackson is Chairman, is supervising plans for a nation-wide study of the adminis-

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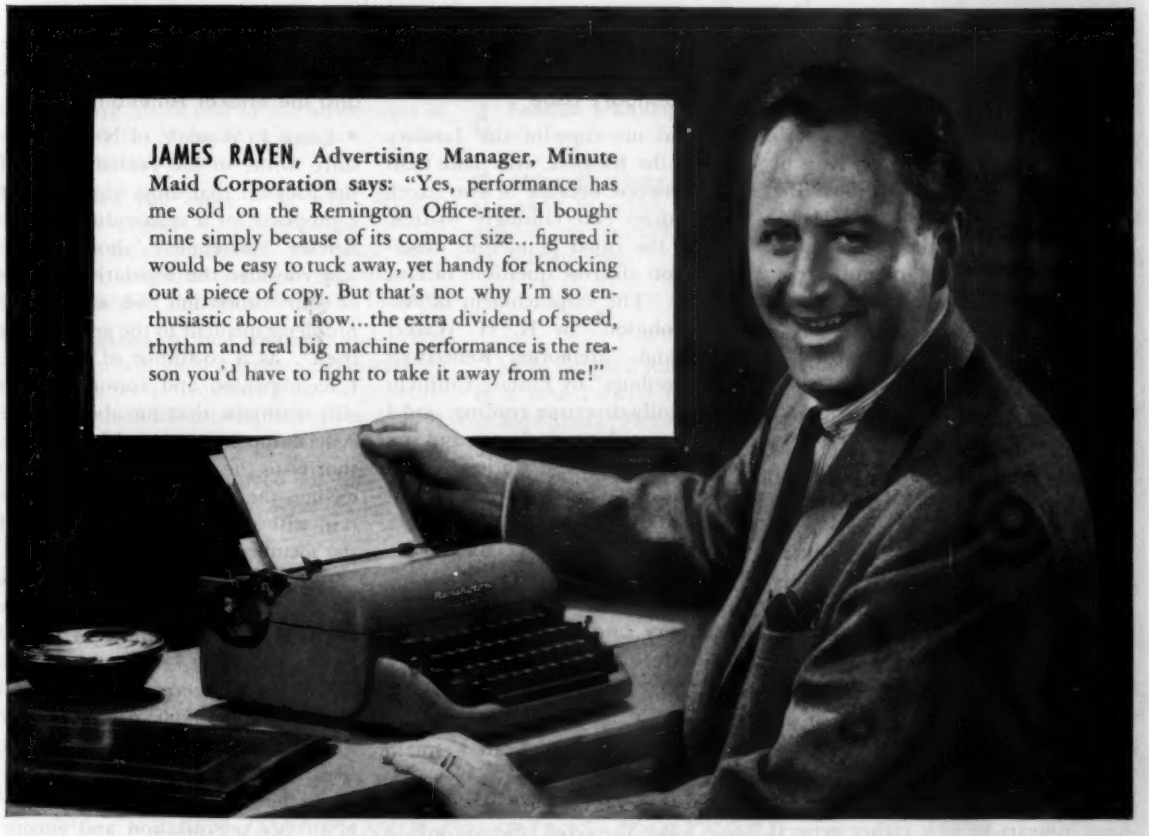

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Views of Our Readers

■ Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the *Journal* or otherwise within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves the selection of communications which it will publish and may reject because of length. The Board is not responsible for matters stated or views expressed in any communication.

Correction

■ In the letter of Louis E. Wyman entitled "Who Speaks for the American Lawyer?" in the January issue of the JOURNAL, there is included the statement: "Outside of the Headquarters staff, no salaries are paid, except that the Secretary and Treasurer receive modest compensation."

This statement should be corrected because neither the Secretary nor the Treasurer receives any compensation, but are in the same position as all other elected officers who receive no compensation for their time devoted to the affairs of the Association. The officers of the Association, as well as Committee members and Section officers, are not only uncompensated, but in fact incur substantial unreimbursed expenses; for example, none of the officers or committee members are reimbursed for travel expenses incurred in attending the Annual Meetings of the Association.

This statement is made to correct what appears to be a rather general impression.

The Impeachment of Andrew Johnson

■ Mr. Lewis' article on the Johnson impeachment (January issue) strikes me as the finest thing of its kind I have ever seen in your JOURNAL and an important contribution to American history. You are to be commended for its selection.

WILLIAM S. HYATT
Kansas City, Missouri

Another Fan of the January Issue

■ I read my copy of the January issue of the JOURNAL with more than usual interest because of two excellent articles entertainingly written. Among the usual ponderous dissertations on abstruse questions of law, I found "The Impeachment of Andrew Johnson" by H. H. Walker Lewis and "Memories, Reflections and Anecdotes" by Eustace Cullinan delightfully diverting reading, and I compliment these gentlemen and you for publishing these stories.

Let us have more articles of that style and quality.

WILLIAM C. BROOKER
Judge, Hillsborough County
Tampa, Florida

Discovery and the Federal Rules

■ Some of my associates in the Section of Judicial Administration were disturbed by the article by Kenneth B. Hawkins in the December issue of the JOURNAL. We are pleased that you have corrected the record to indicate clearly that we are in no way responsible for either its preparation or publication.

I thought it was an interesting reminder of the so-called "good old days". Like pictures of covered bridges, it brought back memories of the days of the open sleigh and the jingle of bells on a frosty night. I am sure that none of us would want to abandon our modern court procedure any more than we would want to give up our modern automobiles. I am of the opinion that the article did no harm.

All of us who are interested in the improvement of the administration of justice should welcome criticism. We will have to admit that the discovery rules, like the modern automobile, when misused can cause great damage. Mr. Hawkins' article should make us all more alert so that such abuse may be avoided. If its publication produces this result, it will have served a useful purpose.

ARTHUR F. LEDERLE
Chairman, Section of
Judicial Administration

DeBard, the Bar and the Bricker Amendment

■ Louis E. Wyman, of New Hampshire, wrote in the January issue of the JOURNAL that those who fathered a proposal for a referendum on the Bricker Amendment "should pause —to consider the legislative aspects of your Association and, as well, the problems incident to the amendment itself". As a co-author of the plan, I have paused and considered but still maintain that members of the Association have not delegated authority to the House of Delegates to change the United States Constitution without further consultation of the membership.

If the House of Delegates were now favoring return of prohibition by constitutional amendment, I should not be satisfied to stay mum by reason of the symmetry of the pyramid whereby some 200 people decide what the 50,000 members want. That, like the Bricker proposal, is a different order of problem from the one of proper organization and encouragement of the Bar—the purpose of the delegation of power to the House of Delegates.

Mr. Holman accepts backing from organizations such as Minute Women of America, Inc., National Economic Council, Inc., and Colonial Dames of America, but Mr. Wyman asserts that the issues are too complicated for the 48,800 other members of the Bar. Over 80 per cent of Americans know nothing about the

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Bricker Amendment. Who but the Bar should be trained to effectively explain the issues?

Since Mr. Wyman's letter went to press, two state bar associations resolved against any amendment of the treaty power. The President of the United States, most law school deans and most of the great newspapers oppose the Bricker Amendment.

The resolution adopted in Boston last August deferred the matter of a referendum "until such time as the House of Delegates or the Board of Governors deems that a referendum should be taken".

The responsibility is thus conspicuously placed. The time for a referendum is now.

STUART DEBARD

Boston, Massachusetts

A Solution to All Our Problems

■ I have read with growing concern the sad analyses of the economics of the legal profession, which have appeared from time to time in the JOURNAL. Careful study has been given to the many published suggestions designed to reverse the path of the profession's own bear market; more education, better education, different education, decentralization, specialization, postgraduate training, more accurate accounting, time sheets or whatever.

May I offer, somewhat shyly, the thought that this sort of remedial action is hopelessly out of date. A modern, effective, simple and tremendously popular solution is available. Legislation should be enacted granting lawyers the option of selling their time either (1) to clients of their own choosing at such fees as they may be able to collect, or (2) to the Federal Government at 90 per cent of parity.

GERALD P. ROSEN

Los Angeles, California

Social Security Is Immoral?

■ I read with interest Dean Larson's article "Social Security and Self-Employed Lawyers: A Plea for Reevaluation". I cannot find disagreement with Dean Larson as to a group of citizens standing independent of the rest of the citizens of the country but I do find disagreement with Dean Larson in two fundamental aspects.

In the first place the Social Security program conflicts diametrically with my religious and moral teachings. I have always been taught and read from my Bible that we are to honor our parents. The whole Social Security fabric presupposes that we will cease honoring our parents and that now we want the Government or some social organization to honor our parents. In my opinion, the social duty that we, as citizens of the United States and of the world, owe is to our aged people individually and not collectively. Social Security is nothing in the world but a purchase of votes by those people who have no faith in the teachings of Jesus Christ. . . .

The next instance in which I disagree with Dean Larson is the fact that even though it may be socially good for us to have a Social Security program the constitutional question must raise its head. Even though I hold that the Social Security program is immoral I would have to acquiesce in it if it were constitutionally so provided. In other words the Social Security program is an enactment of Congress for which there is no constitutional foundation, the Supreme Court of the United States to the contrary notwithstanding. The Supreme Court, through its members who have social consciousness and political doings in mind, rather than law, have ruled that the Social Security program is constitutional. If the *people* of the United States would amend our Constitution to provide for Social Security then I, of course, could have no opposition to that. In my humble opinion the legal profession is doing the country a great disservice even contemplating acquiescing in any Social Security program unless it is through amendment to the Constitution of the United States.

I am not bitter, just scared about the future of my four children.

BROOKS L. HARMAN

Odessa, Texas

Congressional Investigations:

A Plan for Legislative Review

by **Frank E. Horack, Jr.** • Professor of Law at Indiana University School of Law

■ As Lloyd K. Garrison pointed out in an article in last month's *Journal*, congressional investigations have served the country well and we could not do without them, while at the same time some of them occasionally develop excesses which cause their friends both in and out of Congress much concern. Mr. Garrison's article offered some suggestions for getting off the horns of the dilemma; Professor Horack offers here his own suggestion for solving the problem: a Committee in each house of Congress to review witnesses' claims of exemption from giving testimony.

■ Although the great majority of congressional hearings and investigations are conducted with fairness and decorum, a few committees have placed in jeopardy the reputations, dignity and constitutional rights of many persons who have been summoned as witnesses. As a consequence, there has been an insistent demand for limiting the jurisdiction of committee investigations and reviewing the fairness of committee procedure. Some critics have looked to the courts for a revitalization of *Kilbourn* v. *Thompson*[1] and others have proposed enactment of uniform rules for congressional committee procedure.[2] Neither approach offers a complete solution.

Two propositions are self-evident: witnesses should be protected from "fishing expeditions", inquiry into purely private affairs and from enforced testimony which might incriminate; the Government should have the full knowledge, testimony and opinion of all its citizens concerning matters of great national import.[3] Only with the aid of the citizens may Congress discharge what Woodrow Wilson described as the duty "to look diligently into every affair of government and to talk much about what it sees".[4] And if Congress is intended to be the watchdog for the people and "the informing function of Congress should be preferred even to its legislative function",[5] then Congress, not the courts, should determine the limits of its jurisdiction when constitutional guarantees are not involved.

Until recently, the judiciary has respected and reflected Wilson's view and has been reluctant to interfere with the investigating process, for, as Judge Holtzoff observed, "While the power of Congress to carry on investigations is not without limit, nevertheless the Congress has broad discretion in determining the subject matter of the study and the scope and extent of the inquiry. If the subject under scrutiny may have any possible relevance and materiality, no matter how remote, to some possible legislation, it is within the power of the Congress to investigate the matter. Moreover, the relevance and materiality of the subject matter must be presumed. . . . It would be intolerable if the judiciary were to intrude into the legislative branch of the Government and virtually stop the process of investigation."[6]

The Supreme Court, however, undertook judicial review of congressional committee procedure in *Christoffel* v. *United States*[7] even though it soon chose to abandon the experiment in *United States* v. *Bryan*.[8] But late in the last term, in *United States* v. *Rumely*,[9] the Court more boldly restrained committee inquiry even though the decision rested upon the shifting sands of inconclusive statutory construction.[10] Nevertheless, the recent decisions stand as an unmasked warning to congressional committees and will invite further

1. 103 U.S. 168 (1880).

2. Most of the proposals have been collected in Glassie and Cooley, "Congressional Investigations—Salvation in Self-Regulation", 38 *Geo. L. J.* 343 (1950); see also, "Symposium—Congressional Investigations", 18 *U. of Chi. L. Rev.* 421-686 (1951); Wyzanski, "Standards of Congressional Investigations", 3 *Record* 93 (1947).

3. Landis, "Constitutional Limitations on the Congressional Power of Investigation", 40 *Harv. L. Rev.* 153 (1926).

4. Wilson, *Congressional Government* 303.

5. *Ibid.*

6. *United States* v. *Bryan*, 72 F. Supp. 58 (1947).

7. 338 U.S. 84 (1949).

8. 339 U.S. 323 (1950).

9. 73 S. Ct. 543 (1953).

10. The resolution authorized the committee to investigate "lobbying activities". A subpoena issued to procure information concerning "indirect lobbying" was held beyond the jurisdiction of the committee because dictionary definitions of lobbying were restricted to "direct lobbying".

challenges to committee power. Whether the challenges are meritorious or not, the congressional ability to discharge its informing function has been seriously encumbered.

The protection of civil rights, of admitted concern throughout these litigations and certainly of the highest value in our constitutional system, does not require judicial review of internal congressional procedure nor jurisdictional limitation on committee inquiry. Judicial review will not only result in a reduction in the power of Congress but also in a decline in congressional responsibility. And the courts' inquiry cannot be easily confined to the cases of "legislative" investigations: no logical boundary separates investigation of the administration of the Government, investigation under the treaty power, impeachments, confirmations of appointments, and even member-discipline and the review of elections. Judicial review of all these diverse subjects would present many embarrassing political questions and a gradual withdrawal of judicial review similar to that which followed *Kilbourne* v. *Thompson*[11] might be predicted.

Uniform Rules Have Three Weaknesses

Thus, the great majority of writers have opposed an expansion of judicial review and argue that Congress should assume full responsibility for supervising committee action by enacting uniform rules of procedure binding upon all standing and select committees. The adoption of uniform rules may contribute to an improvement in committee procedure, but basically they suffer from three weaknesses: (1) Different committees have widely differing responsibilities and thus a sensible rule for one may be utter folly for another. (2) The enactment of uniform rules is no guarantee that the committees will comply. Good committees can make good rules, but good rules cannot make good committees. And (3) they provide no sanctions for their enforcement.

The real need is for a system of legislative review to enforce uniform rules and insure fairness and responsibility of investigations. Theoretically, this is possible now by any member of the House moving to rescind the committee's authority or to confine it by restrictive amendment, but politically it is impossible. The only way the issue reaches the floor of the House is for a witness to refuse to testify and for the committee to seek a resolution from the House for his prosecution either before the bar of the House or in the federal courts.

When the issue is raised in this manner it does not present the question of whether the committee has exceeded its authority or whether the questions have been relevant and material, but whether the chairman of the committee is entitled to a vote of confidence from his party and from the House. The witness is unrepresented and his cause is soon forgotten. Congressmen who privately condemn the actions of the committee feel compelled to vote in support of the committee because the party leadership insists that a vote of confidence is essential to maintain the party position, and individual members, regardless of the merits of the particular controversy, feel that a negative vote would jeopardize their own positions as committee chairmen. Uniform rules will not repeal congressional courtesy.

The philosophy of *McGrain* v. *Daugherty*[12] can be maintained and judicial review avoided if the Houses establish a system of legislative review. The proposal would permit a witness to challenge the authority of an investigating committee by an appeal to a review committee appointed by the House. The committee should be bipartisan in character, composed of three members from each major political party. The members should be selected from the lawyer members and should have extensive legislative experience and be held in high personal and professional respect by both sides of the House. In addition to the six members there should be a panel of alternates from which members can be selected in case an appeal is taken from a committee which includes a review committee member.[13]

A committee witness should not be permitted to challenge the sufficiency of the subpoena before the review committee prior to his appearance before the investigating committee, for the presumption should be in favor of the propriety of the inquiry and the witness' obligation to provide information to the Government. After appearance, however, the witness should be able to challenge the propriety of specific questions on the ground that (1) the inquiry is beyond the jurisdiction conferred by the House resolution or the terms of the subpoena, (2) the question is not material or relevant to the inquiry,[14] or (3) the question invades the witness' constitutional rights. Challenge of committee authority would be raised as it is now by the witness' refusing to answer. In addition, the witness would be required to indicate his intent to appeal to the review committee. Thereafter, the investigating committee could not seek a resolution authorizing prosecution for contempt until after the review committee handed down its decision.

The witness would be obligated to notify the review committee of an appeal by the second day following the day on which the question was asked.[15] The appeal would be on the record, that is, a verified copy of the resolution authorizing the inquiry, the subpoena, if one had been used, and the verbatim transcript of the pertinent questions asked by the committee. In order to prevent delay and discursive dilatory tactics, the committee should have the right to ask all questions which it considered pertinent to its inquiry and the wit-

11. 103 U.S. 168 (1880).

12. 273 U.S. 135 (1926).

13. Admittedly, personnel of this caliber will be already overburdened with responsibility, but with staff-aides of Supreme Court clerk ability, they should be able to discharge these additional obligations.

14. On legislative review, the issue of materiality and relevance should be much broader than in judicial review. See, *infra* page 194.

15. When the investigating committee is holding hearings outside of Washington, the time for notifying would, of course, have to be lengthened.

ness should be obligated to raise all his objections at one time so that the entire matter might be disposed of on one appeal.[16]

In support of the appeal, the witness and the committee should be permitted to file written briefs. Inasmuch as the matter in controversy usually will be known to the witness and the committee in advance of the hearing, a ten-day briefing period should be sufficient. In cases of unusual difficulty the review committee, in the same manner as a court, should have the power to extend the time for filing. Reply briefs and oral argument should be discouraged but not prohibited. The psychological advantage of assuring the witness that his case has actually been heard by the review committee should outweigh the burdens which oral arguments impose on the review comittee and the delays to the conduct of the investigation.

Within as short a period as possible after the conclusion of arguments the review committee should be obligated to render its decision, in order that the investigation may proceed if the decision is favorable to the committee, and that the witness' position may be speedily confirmed if the decision is against the committee. The decision of the review committee should be accompanied by a written opinion. Copies of the opinion should be available immediately to the witness and to the committee, and in order that a body of precedents may be developed the opinions should ultimately be printed and published.

It Is To Be Hoped That Few Witnesses Would Remain Recusant

If the decision of the review committee sustains the investigating committee, the witness could be recalled under the original subpoena merely by informing the witness of a new date set for the hearing. If the witness continued recusant, the committee could then move for a house resolution authorizing prosecution for contempt. Although the vote on this motion would in effect amount to a reconsideration by the whole House of the review committee's decision, unless there had been a vigorous dissent by a review committee member the adoption of the resolution would be in most instances automatic. It is to be hoped, of course, that in these circumstances few witnesses would remain recusant. If the review committee proceeds in an impartial and judicial manner, courts should give great weight to its determinations particularly where they relate to matters of jurisdiction or internal committee procedure. Witnesses should, therefore, be less successful in their judicial appeals and should conclude that the expenditure of time and money will gain them little.[17]

Conversely, if the decision is against the investigating committee, the witness should not only feel vindicated but should also be protected against further harassment. Congress in the enabling legislation could grant complete finality to the decision, *i.e.*, make a subsequent resolution based on the matter at issue out of order, place the members of the committee in contempt if they proceeded with the questions, or make a continuation of the inquiry grounds for the withdrawal of the committee's authority. The severity of these sanctions and the fact that enforcement would raise a political question for the entire membership to decide argues against complete finality to the review committee's decision. Furthermore, formal abdication of the authority of the house is not in keeping with legislative practice.

A second possibility would be to give finality to the decision unless it was appealed by the investigating committee for reconsideration by the whole house. This appears to be a needless step and tends to reintroduce political considerations which the review procedure seeks to eliminate. A better procedure would permit the decision to be attacked collaterally.

Under this third proposal, if, after an adverse decision, the investigating committee recalls the witness and the witness again refuses to answer, the committee may seek a resolution authorizing a prosecution for contempt. In effect this action challenges the decision of the review committee not in an abstract way, as in the second situation, but within the framework of an actual litigation. Presumptively, the decision of the review committee, because it is rendered by an impartial tribunal not concerned with the inquiry, should prevail. The house will be aware that a court would more likely, in deciding a contempt prosecution, follow the decision of the independent committee than of the prosecuting committee; therefore, the house, when it must choose between the decisions of the two committees, is likely to accept the review committee's verdict.

Perhaps the greatest merit to the procedure is that it keeps the issues narrow and balances political pressures. The issue will not be: Should we support our appointed committee against the attack of a nonmember?

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16. This does not imply, however, that after a notice to the review committee has been issued, the hearing committee cannot withdraw the question or the witness indicate his willingness to answer thereby making the appeal moot.

17. It is conceivable, if the legislative review proved to be a highly reliable process, that witnesses after an adverse decision by the review committee might more frequently receive maximum fines and imprisonment upon their conviction in court.

or, Will an adverse vote injure the political position of the majority party? The issue framed under this proposal will be: Which of two committees has more accurately determined the propriety of a particular question asked of a particular witness under a specific resolution authorizing an inquiry? On such a question, reasonable men admittedly may differ, but the decision of the house is now more easily confined to the merits of the question and the political pressures are now balanced, for the decision of one committee must be sustained and the decision of the other must be reversed.

There are other advantages of legislative review. When the question is decided judicially, concepts of separation of powers and intergovernmental relations must be considered by the court. Is it wise and proper, therefore, for the court to review the internal workings of a legislative committee unless compelled by constitutional direction? If the court interferes will it encourage witnesses, without cause, to delay investigations necessary to the national security and welfare? If the court refuses to interfere, will this be interpreted by congressional committees as *carte blanche* authority to proceed without restraint? These questions need not perturb the legislative review committee. They are a part of the legislative process and may police the committees with a view to maintaining the reliability and insuring the public respect and confidence in the fairness and impartiality of legislative investigations.

When a court decides issues of "relevancy and materiality" it must limit its decisions to jurisdictional constitutional questions. The legislative review committee, however, can consider not only the jurisdictional and constitutional questions but also the import of specific questions on the total conduct of the hearing. If, for example, the house adopts rules for the governance of committee hearings and investigations similar to those which have been proposed,[18] the review committee could restrain the investigating committee from asking questions concerning personal and private belief, from inquiring into matters adversely affecting reputation without insuring the witness the opportunity of filing a sworn statement in refutation, or from requiring testimony without the presence of counsel. These are but a few of the safeguards suggested in the uniform rules, but practically all of them are susceptible to better enforcement by the legislative review committee than by the courts.

Courts Cannot Easily Protect Congressional Witnesses

The courts have no convenient way by which to restrain a committee from establishing "guilt by association", from disparaging and "convicting" unfriendly witnesses or from releasing partial and misleading transcripts of evidence. Legislative review, however, could properly provide this type of supervision. The house, through the review committee, could protect its own record and maintain proper responsibility to its constituents.

Decisions of this character are admittedly difficult to make and for obvious reasons no legislator would make them voluntarily. Thus, a legislative procedure which requires the witness to raise the issue and imposes by statute the duty of deciding on the review committee, not only appeals to the lawyers' respect for review procedure, but also is politically attractive because the review committee is not required to take the initiative and the membership of the house need not vote on broad and inarticulate political issues. Each decision, as at common law, will be made on the narrow facts of the particular case.

This procedure offers advantages both to the witness and to the government. The witness can get an early determination of his case with a lesser expenditure of time and money. This is not an inconsequential advantage, for the risk of criminal prosecution with all its implications and insinuations has no doubt forced more than one witness to testify when he was in fact privileged.

The advantages to Congress will also be great. The four or five years' delay required by the current method of prosecution for contempt will be eliminated in the majority of cases. The Government, if it is entitled to it, will have the advantage of important testimony when it needs it most. The spectacle of a willful witness stopping the machinery of government should become rare, for if legislative review is impartial and competent, such a witness can foresee slight chance of acquittal if the review committee decides adversely in his case. Conversely, legislative review should insure fairer treatment of all witnesses and to that extent most witnesses should be willing to testify more freely. Finally, the investigating function should be made a responsible process and thereby be relieved of the charges of bias and prejudice.

Admittedly, legislative review will cause an initial increase in the number of cases, but if the procedure is well administered the increase will be temporary. Soon the investigating committees will recognize the limits of their own power, and witnesses will learn that spurious objections will not be sustained. Ultimately, only the meritorious borderline cases where reasonable men differ will be litigated.

Legislative review will fill the hiatus between unenforceable rules of committee procedure and undesirable judicial intervention in the legislative process.

18. See *supra*, note 2.

The Myth of Administrative Generosity:

A Lesson from British Experience

by **Arthur Larson** • Dean of the University of Pittsburgh Law School

▪ "The popular notion", Dean Larson writes, "is that if you give salaried public servants the job of handing out public funds, they naturally will be as open-handed as they can possibly find any excuse for being, since, after all, such largesse does not cost the administrator anything out of his own pocket." One might expect the administrator of a workmen's compensation law, paying claims out of government funds, making unreviewable decisions, to be especially generous, particularly in a socialistic state. The experience of the British, under their national insurance program, appears to be to the contrary. Dean Larson points out that in some cases the Ministry of National Insurance has proved more tight-fisted with money and less liberal in its interpretations of the law than the courts under the old system.

▪ Ever since the beginnings of workmen's compensation in this country about forty years ago, there has been a body of opinion which argued that if we could only get rid of lawyers, courts, private insurance and "the troublesome element of employer resistance"[1], and substitute public administration of benefits by impartial public servants in the public interest, we would usher in a golden age of compensation in which the ideals of the legislation would at last be realized.

In 1948 precisely this change took place in Great Britain. Workmen's compensation, in the old sense, was abolished. The administration of industrial injuries benefits became a department within the comprehensive national insurance scheme. Court review was eliminated.[2] Lawyers were barred at all levels except the final appeal to the Commissioner. Private insurance was abolished, of course, since the new system was entirely state financed. And as for the employer, far from having any occasion to offer resistance, he was not even to be informed whether claims of his employees were granted or denied, since he was not affected by the outcome directly or indirectly.

We thus have had presented to us a clean-cut comparison of systems, in which we may analyze factually a question on which theorists have hitherto been able to make assertions without the embarrassment of having the assertions checked against experience. The question is this: Is a statute in the hands of unreviewable administrators dispensing government funds more beneficently interpreted than a statute interpreted ultimately by courts as a result of adversary contests involving interested employees, employers and insurers represented by counsel?

The direct way to obtain the answer to this question is to set side by side the decisions of the British Commissioner of Insurance and those of the appellate courts in this country and in England, and see how they compare.[3] This comparison leads to two conclusions: first, although the statutes being interpreted are similar, the body of interpretative doctrine now in force in England after five years of unrestrained administrative construction is conspicuously narrower than corresponding doctrine prevailing in the leading compensation jurisdictions of the United States under our system of judicial review; and second, the Commissioner's decisions have not in the slightest degree liberalized the interpretation of the English compensation statute (whose coverage formula remains essentially

1. The phrase is taken from Davis, "Standing to Challenge and To Enforce Administrative Action" (1949), 49 *Col. L. Rev.* 759, at page 789, where he quotes the following statement from Robson, *Justice and Administrative Law*, page 197: "The inherent defects of workmen's compensation are due to the fact that it is based on private rights, private negotiation, private disputes, private interests and private finance, as distinct from the social insurance schemes which are based on the principles of social rights secured by public administration, public interest and public finance."

2. There is limited review of decisions of the Minister of National Insurance on certain questions of law relating principally to liability for contributions and insured status; but the great bulk of the cases come before the Commission of Insurance, whose decisions are final even on questions of law.

3. The writer expresses no opinion here on the relative merits of the lines of interpretation compared, nor on the question whether the Industrial Injuries Act was on the whole a change for the better in England.

unchanged)—in fact, wherever a departure from judicial precedent has appeared, it has had the effect of constricting rather than broadening the benefits of the act.

A Point-by-Point Comparison of Current British and American Law

The first proposition may be demonstrated by comparing the state of current British and American interpretative law on ten representative points.

(1) *Horseplay*. A man, "in jocular mood", came into a canteen and picked up the claimant, saying he was going to hang her on a peg. In so doing he hurt her back. The British Commissioner denied industrial injury benefits.[4] Denials to innocent victims of horseplay are routine in England, unless there is "something in the character of the employment and in the surrounding circumstances to create a risk of skylarking".[5] By contrast, since Judge Cardozo's opinion in the *Leonbruno* case,[6] it has been equally routine in the United States to grant compensation to the nonparticipating victim of horseplay. The only area of controversy in the United States is the extent to which participants in horseplay may be permitted to recover; in certain circumstances, such a recovery even by an instigator is conceivable,[7] but in England it seems to be taken for granted that recovery by a participant would be out of the question.[8]

(2) *Assault*. A woman whose duties required her to travel by train was assaulted and robbed while alone in her compartment. Industrial injury benefits were denied, on the ground that she was subjected by her work to no special risk of assault.[9] By contrast, it is usually held in America that the risk of assault by robbers is a compensable risk of travel.[10] Moreover, the "aggressor defense" in assault cases, which has been under some attack in this country,[11] is even stricter in England. For example, a laborer who, while loading scrap, called a fellow workman a "lazy swine" and was assaulted as a result, was denied benefits.[12] In the great majority of American jurisdictions, mere words will not give rise to the "aggressor defense".[13] In fact, two states have abolished the defense altogether.[14]

(3) *"By accident"*. The Commissioner has largely abandoned the "repeated-impact" doctrine worked out by the House of Lords,[15] which held that each of a series of small bumps, scratches, abrasions or impacts could be viewed as a separate "accident". And, although as long ago as 1910 it had been established that " 'injury by accident' meant nothing more than 'accidental injury' ",[16] the Commissioner now says that there must be *"an* accident" in the popular sense.[17] Accordingly, claims have been denied for such injuries as Dupuytrens contraction from repeated jarring,[18] and strained chest muscles from repeated lifting of blocks weighing about sixty pounds.[19] The American position on this issue cannot be readily summarized, but it is probably fair to say that the majority of courts have recognized the possibility, on one theory or another, of compensating gradually acquired injuries of the type now held noncompensable in Britain.[20] Specifically, Dupuytrens contraction from repeated jarring has been held compensable in Indiana,[21] and muscle strain although resulting from routine exertion has been the subject of awards.[22]

(4) *Idiopathic falls*. Benefits have been denied by the Commissioner for epileptic falls to a level concrete floor;[23] there is some authority in the United States supporting awards in such cases, especially when the hardness of the floor was an added hazard.[24]

(5) *Recreation*. Injuries in the course of recreational activities appear to be noncompensable under the Commissioner's decisions, although the recreation is encouraged by the employer and takes place on the premises or during working hours —even in a recreation room provided by the employer.[25] By contrast, injuries from recreation which takes place on the premises during working, lunch or recreational hours, with the employer's sanction or encouragement, are generally held compensable in the United States.[26]

(6) *Traveling employees*. Injury to a traveling man while staying in lodgings necessitated by his travel is noncompensable under the Commissioner's decisions if the traveling man had a free choice of lodgings.[27] This test, which at one time had some cur-

4. No. C. I. 322/50 (not reported), referred to in No. R(I) 31/51. Decisions of the Commissioner, which are cited only by number, are obtainable from H. M. Stationery Office, Kingsway, London, W. C. 2.

5. No. R(I) 31/51; No. C. I. 170/49.

6. *Leonbruno* v. *Champlain Silk Mills*, 229 N. Y. 470, 128 N. E. 711, 13 A.L.R. 522 (1920); and see cases cited in Larson, *Workmen's Compensation*, Volume I, §23.10, footnote 1. To avoid burdening this article with the hundreds of cases which might be cited as authority for the American compensation doctrines discussed, only one or two representative cases are given at each point.

7. See Horovitz, "Assaults and Horseplay", 41 *Ill. L. R.* 311 (1946).

8. No. C. I. 97/49.

9. No. R(I) 41/51.

10. *Beem* v. *H. D. Lee Mercantile Co.*, 337 Mo. 114, 85 S. W. 2d 441, 110 A.L.R. 1044 (1935); *State Compensation Insurance Fund* v. *Industrial Commission*, 80 Colo. 130, 249 Pac. 653 (1926).

11. Horovitz, *op. cit.* note 7 *supra*.

12. No. C. I. 5/50.

13. *Hartford Accident & Indemnity Co.* v. *Cardillo*, 72 App. D. C. 52, 112 F. 2d 11 (1940); *Sanders* v. *Jarka Corp.*, 1 N.J. 36, 61 A. 2d 641 (1948); and other cases collected in *op. cit. supra* note 6, §11.15(c).

14. *Newell* v. *Moreau*, 94 N.H. 439, 55 A. 2d 476 (1947); *Dillon's Case*, 324 Mass. 102, 85 N. E. 2d 69 (1949).

15. *Burrell & Sons, Ltd.* v. *Selvage*, 90 L.J. 1340 (H. L. 1921). By "confining the case to its own facts" the Commissioner has disavowed the principle of general applicability for which the case stood.

16. Lord MacNaghten in *Clover, Clayton & Co.* v. *Hughes* (1910), A.C. 242, 3 B.W.C.C. 775.

17. No. C. I. 257/49

18. No. C. I. 125/50.

19. No. R(I) 42/51.

20. See *op. cit. supra* note 6, §39.10, footnote 16, pages 569-573, compiling cases granting awards and footnote 17, pages 574-576, compiling denials.

21. *American Maize Products Co.* v. *Nichiporchik*, 108 Ind. App. 502, 29 N.E. 2d 801 (1940).

22. *Bystrom Bros.* v. *Jacobson*, 162 Wis. 180, 155 N.W. 919 (1916); *Tapel Electric Co.* v. *Scherle*, 295 Ky. 99, 173 S.W. 2d 810 (1943).

23. No. R(I) 12/51. See also No. C. I. 68/49 (epileptic found at foot of stairs after unwitnessed fall; benefits denied).

24. See, e.g., *General Insurance Corp.* v. *Wickersham* (Tex. Civ. App.) 235 S.W. 2d 215 (1951); and other cases in *op. cit. supra* note 6, §12.14.

25. See, e.g., Nos. C. I. 70/49, C. I. 17/50, (R(I) 57/51 and R(I) 25/51. *Aliter*, of course, if the physical training is compulsory. Nos. C.I. 228/50, C.I. 314/50, and R(I) 68/51.

26. See, e.g., *Thomas* v. *Procter & Gamble Co.*, 104 Kan. 432, 179 P. 372 (1919) (playfully riding hand truck during lunch hour); *Brown* v. *United Services for Air, Inc.*, 298 N.Y. 901, 84 N.E. 2d 810 (1949) (volley-ball).

27. Nos. C.S.I. 3/49 and C. I. 374/50.

rency in the United States, is now largely discredited here; the majority of jurisdictions deem hotel-fire injuries to traveling men generally compensable.[28] Another decision of the Commissioner which would come as quite a shock to American traveling men if applied to them was a case in which it was decided that a salesman who drove a car furnished by his employer with all expenses paid, and who was injured between his home and his territory while on his direct route to see a customer, was not in the course of his employment.[29] It is unlikely that a claim on these facts would even be defended anywhere in the United States.

(7) *Going and coming.* Going to and coming from work, off the premises, is held to be outside the course of employment by the Commissioner in several situations in which most American jurisdictions would award compensation. Instances include: a stricter rule as to when payment for time and expense of travel will bring the trip within the course of employment;[30] refusal to include riding on the employer's conveyance within the course of employment when the employer is engaged in public transportation;[31] refusal to accept the view that crossing a public road between two parts of the employer's premises is within the course of employment,[32] as well as another American exception to the premises rule in the case of public roads which in effect are a part of the premises because they lead nowhere else.[33]

(8) *Dual-purpose doctrine.* An employee, while on vacation, was asked to extend his stay in Paris one day in order to visit a factory there. His return journey from Paris was held by the Commissioner to be personal and not in the course of employment.[34] On similar facts, under the American dual-purpose doctrine, Illinois awarded compensation to a chemist who, having made the requested business call on the day after his vacation expired, was injured on the direct route back.[35]

(9) *Incidental activities.* Industrial injury benefits were denied to a worker who hurt his hand in a machine while engaged in a momentary personal conversation with a coworker.[36] Although comparable decisions can be found among earlier American cases,[37] modern cases recognize that employees can engage in a normal amount of incidental social activity during working hours without abandoning their employment, as when a worker, for example, crossed the room to borrow tobacco from a fellow-employee.[38]

(10) *Liberal construction.* This catalogue of strict Commissioner decisions may well be closed with a case which establishes no particular doctrine, but evidences a general disposition toward strict construction of statutory language for which no parallel could be found in the most conservative American court.[39] The question was whether claimant's husband, who died of pneumoconiosis, came within the statute requiring him to have been in "an occupation involving . . . the blasting of metal castings to free them from adherent siliceous substance by means of any abrasive, by a blast of compressed air, by steam or by a wheel". Claimant's job involved the following operations: first he chipped out the siliceous core of a casting using a chipping tool driven by compressed air; then he used a compressed-air-driven carborundum wheel to grind out what remained; finally he blew the sand away with a compressed-air hose. If there ever was a job which was intended to come within the statute, this would seem to be it. But the widow was denied benefits on the following remarkable reasoning:

> The introduction of the distinction between *by means of* an abrasive, and *by* a blast of compressed air, *by* steam or *by* a wheel must, I think, be given some effect. It seems to me that it is only in cases where the blasting is "to free [the castings] . . . *by means of* an abrasive" that the paragraph is satisfied . . . that is to say, in effect the abrasive has to be propelled by compressed air, by steam or by a wheel. . . .
>
> The question, therefore, arises whether any of the methods used by the claimant's late husband can be described as freeing metal castings

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28. *In re Buck's Estate*, 277 App. Div. 125, 98 N.Y.S. 2d 734 (1950), leave to appeal denied, 301 N.Y. No. 602, 95 N.E. 2d 57. Cf. earlier dicta in *Kass v. Hirschberg, S. & Co.*, 191 App. Div. 300, 181 N.Y.S. 35 (1920). Hotel-fire cases are collected in op. cit. supra note 6, §25.10.

29. No. R(I) 51/51.

30. Nos. R(I) 9/51 and C. I. 48/49; cf. American rule, as exemplified by *Voehl v. Indemnity Insurance Co.*, 288 U.S. 162, 77 L. Ed. 676, 53 S.Ct. 360 (1933).

31. Nos. C. I. 398/50 and C. I. 35/50. Cf. *City of San Francisco v. Industrial Accident Commission*, 61 Cal. App. 2d 248, 142 P. 2d 760 (1943) and *Micieli v. Erie RR. Co.*, 131 N.J. 427, 37 A. 2d 123 (1944), holding that a streetcar or railway employee returning home on a free pass is covered; *contra, Tallon v. Interborough Rapid Transit Co.*, 232 N.Y. 410, 134 N.E. 327 (1922).

32. No. C. I. 65/49. Cf. *Kuharski v. Bristol Brass Corp.*, 132 Conn. 563, 46 A. 2d 11 (1946) and other cases collected in op. cit. supra note 6, §15.14.

33. No. R(I) 72/51 (parks laborer on cul-de-sac road leading to park gate, tended by himself). Cf. *Cudahy Packing Co. v. Parramore*, 263 U.S. 423, 68 L. Ed. 369, 44 S. Ct. 153, 30 A.L.R. 532 (1923); *Christian v. Chicago & Illinois Midland Ry. Co.* (Ill. App.), 97 N.E. 2d 576 (1951).

34. No. R(I) 70/51.

35. *Irwin-Neisler & Company v. Industrial Commission*, 54 Ill. 456, 178 N.E. 357 (1931). Accord in principle, *Standard Oil Company v. Smith*, 56 Wyo. 537, 111 P. 2d 132 (1941) (gas station employee picked up two barrels of oil which happened to be on his route back from his vacation trip and was thereafter injured).

36. No. R(I) 69/51.

37. E.g., *DiSalvio v. Menihan Co.*, 225 N.Y. 123, 121 N.E. 766 (1919).

38. *Wickham v. Glenside Woolen Mills*, 252 N.Y. 11, 168 N.E. 446 (1929).

39. No. C. I. 100/50.

from adherent siliceous substance by means of an abrasive. The Oxford English Dictionary defines "abrade" to mean "to rub or wear off" or "rub away".... Neither a chipping tool nor carborundum wheel nor compressed air are, in my view, capable of being spoken of as such substances.... Even if a carborundum wheel is an abrasive, because carborundum is an abrasive it would still be necessary to show that the metal casting was blasted by means of it. To blast is defined in the Oxford English Dictionary to mean "to blow violently"....

Finally, even if the compressed air is an abrasive, the claimant's late husband did not blast the metal castings to free them from adherent siliceous substance by means of it. "Adherent" is defined in the Oxford English Dictionary to mean "sticking fast to, attached materially". When the claimant's late husband used the blast of compressed air to blow away the sand, he had already caused it to cease to be adherent to the metal casting. It was no longer sticking fast to, or attached materially to the casting; it was lying loosely on it.

It may be doubted whether "employer resistance" of claims in this country has ever risen to such heights as to offer in defense such a legalistic cumulation of hair-splittings as this, or, for that matter, to contend that a carborundum wheel is not an abrasive. Immersed in the *Oxford English Dictionary*, the author of the opinion lost sight completely of the plain object of the statute, which was to provide benefits for people just like this, who are subjected to free silica while cleaning sand out of castings with abrasives and compressed air.

Commissioner Is Not Bound by Court-Made Law

It might be answered to all this that a comparison of current English and American interpretations is an unfair test of the generosity of administrators because the English decisions reflect judicial precedents already in existence. If this is so, it is not because the Commissioner believes himself bound to follow these precedents. He has said that "it is as a rule unnecessary in deciding cases under the Industrial Injuries Act to refer to decisions under the Workmen's Compensation Acts for the purpose of comparison or contrast...."[40] Whether or not the Commissioner is right in this assumption of freedom from judicial precedent—and there might well be room for argument in view of the principle that the re-enactment of the language of an authoritatively construed statute implies a use of the statutory language as so construed—the point is that the Commissioner is not making his present interpretations because he feels legally constrained to do so by prior case law. He could—at least in his own opinion—make decisions just as broad as the American decisions with which his have been contrasted, if he believed the broader construction to be right.

Now, it is true that, bound or not, the Commissioner has almost invariably followed the judicial authorities, waiving, so to speak, his theoretical freedom to decide settled points of construction afresh. As of May 20, 1952, one hundred and five citations of judicial precedents had been made in sixty-four reported decisions of the Commissioner. In not a single instance did the Commissioner depart from the judicial interpretation in order to broaden it.

In several cases, however, he parted company with judicial precedent in order to narrow the doctrine announced by the courts. The most conspicuous example is the constricting of the concept of injury by accident,[41] already discussed in heading (3) above, particularly the "repeated-impact" doctrine of the *Selvage* case.[42]

Another example involves epileptic falls onto an unusually hard floor. The judicial background was this: in 1933 the *Lander* case[43] had denied compensation for such a fall, but in 1946 the *Wilson* case,[44] in passing on an epileptic fall into a water-filled ditch, had said that the *Lander* case was "bad law". In addition, there was a Scottish case directly in point favoring compensability.[45] The Commissioner, confronted with a free choice between the earlier case and the later case discrediting the earlier, chose the earlier, "with great respect to the court which decided Wilson's case", and denied industrial injury benefits.[46]

Again, the "added-risk" doctrine seems to be making a comeback, when denials are accompanied by such statements as: "He seems to me voluntarily to have run a needless risk";[47] although in 1945 it was authoritatively said of the added-risk principle: "It may be doubted whether the principle now has any practical application, if indeed it has any existence."[48]

Finally, the Commissioner has cut down the "zone of danger" or "positional risk" theories,[49] worked out by the Court of Appeals and the House of Lords, under which an injury was deemed to arise out of the employment if the employment so placed the employee that he was injured by some outside force, such as a falling wall[50] or tree.[51] An earnest but unsuccessful effort to save these doctrines was made by the dissent in the case, discussed earlier, of the traveling woman assaulted in a train compartment.[52]

How are we to explain this apparent paradox of public administrators taking a stricter line of interpretation than courts of law subjected to the resistance of employers, insurers and their counsel?

(Continued on page 262)

40. No. C. I. 70/49. Conferences with administrators in the Ministry of National Insurance confirm the prevalence of the idea that pre-existing case law is no longer binding.

41. See the elaborate discussion of this topic in No. C. I. 257/49, as well as Nos. C.S.I. 21/49, C.S.I. 125/49, C. I. 87/50 and C I. 125/50.

42. *Burrell & Sons, Ltd.* v. *Selvage*, 90 L.J. 1340 (H.L. 1921). An occasional case appears, however, so close to the *Selvage* case's facts that its holding is still applied. See, e.g., No. R(I) 77/51.

43. *Lander* v. *British United Shoe Mach. Co., Ltd.*, 26 B.W.C.C. 411.

44. Wilson v. *Chatterton*, 39 B.W.C.C. 39, 1 K.B. 360, (1946) 1 All E. R. 431.

45. *Wright & Greig, Ltd.* v. *M'Kendry*, 56 S.L.R. 39, 11 B.W.C.C. 402 (1918).

46. No. R(I) 12/51.

47. No. R(I) 69/51, discussed under heading (9) above.

48. Willis, *Workmen's Compensation*, 37th ed. (1945) page 62.

49. *Powell* v. *Great Western Railway Co.*, (1940) 1 All E.R. 87 (C.A.).

50. *Thom* v. *Sinclair*, (1917) A.C. 127, 116 L.T. 609, 10 B.W.C.C. 220.

51. *Lawrence* v. *George Matthews*, (1929) 1 K.B. 1, 21 B.W.C.C. 345.

52. No. R(I) 41/51, heading (2) above.

The Strange Case of Alger Hiss

A Reply to Lord Jowitt

by Claude McColloch • Judge of the United States District Court for the District of Oregon

■ This is a review of *The Strange Case of Alger Hiss*, a recent book written by the Earl Jowitt, former Lord High Chancellor of Great Britain under the Labour Government. The book was published in England last year. The advance copies of the American edition were recalled by the publisher to correct some of the errors of the original printing. Publication of this study of the Hiss trial with its criticism of the verdict, has evoked much critical comment.

■ Many have wondered why the Earl Jowitt,[1] former Solicitor General,[2] former Attorney General,[3] former Lord High Chancellor,[4] of Great Britain, wrote *The Strange Case of Alger Hiss*.[5] The Earl says it is something of a custom in England for books to be written reviewing important cases; that this has been found useful, and it occurred to him similar advantage might follow if he reviewed the *Alger Hiss* case. But is it customary for a retired Lord Chancellor to put out a book criticizing the conduct of courts in a contemporary state trial in another country? His Lordship himself suggests that his action is "unusual" (page 6). In truth, the book seems far more strange than the case.

The book was published in England in the spring of 1953 before it was printed in the United States, purged of some of the egregious errors in the original English edition.[6]

1. William Allen Jowitt, 1885; created first Earl Jowitt, 1951; viscount in 1947; baron in 1945; knight in 1929; called to the Bar, Middle Temple, 1909; K.C., 1922; Member of Parliament (Labour Party) at various times since 1922; Attorney General, 1929 to 1932; Solicitor General, 1940 to 1942; Paymaster General, 1942; Minister Without Portfolio, 1942 to 1944; First Minister, National Insurance, 1944-1945; Lord Chancellor, under the Labour Government, 1945-1951. See *Who's Who*, 1953.

2. Second law officer of the Government of Great Britain, ranking next to the Attorney General, and appointed to assist the Attorney General. He is always a barrister. See next footnote.

3. Chief law officer of the Government of Great Britain, and head of the English Bar. The Attorney General and Solicitor General (see footnote 2) are practicing barristers normally with parliamentary seats, their terms being coextensive with that of the government currently in power which appointed them. Their functions are to advise the government on legal matters and to conduct important litigation. "The Job of an Attorney General is to support his party in power; he is avowedly a partisan who is expected to fight for the government with all the zeal he can show." R. M. Jackson, *infra*.

The Director of Public Prosecutions is responsible for the conduct of the most serious criminal cases. He is appointed by the Home Secretary but acts under the general direction of the Attorney General, who is the political minister responsible to Parliament. The duties of the Director are contained in rules made by the Attorney General. The actual steps in prosecuting are taken either by the Director's staff or by a solicitor appointed by him. The Attorney General nominates counsel who are to receive briefs at the Central Criminal Court. Usually the Director appears for the crown in the Court of Criminal Appeal. See R. M. Jackson, *The Machinery of Justice in England* (2d Ed. 1953, Cambridge University Press) pages 114 *ff*.

4. The Lord High Chancellor of Great Britain, in origin the keeper of the King's Seal and his personal dispenser of equity, is now an appointee of the government currently in power and a member of the Cabinet, and presides over the House of Lords, seated on the "Woolsack"; nominated by the Prime Minister, usually from such members of the Bar as hold or have held the office of Attorney General or Solicitor General, he, unlike appointed judges, retires from office with the party to which he is attached, being expressly excepted from the term of office during good behavior provided for the judges in the Judicature Acts. In modern times he combines functions of all three departments of government, and in one phase is substantially a minister of justice, nominating judges for appointment other than certain ones nominated by the Prime Minister; he is an ex officio member of the Chancery Division of the High Court of Justice, but very rarely sits in that capacity; he does not act as a trial judge in criminal cases; his judicial functions are exercised in the House of Lords and the Judicial Committee of the Privy Council, in both of which, however, he is, when present, only the presiding judge, and his presence is unnecessary. His salary is 10,000 pounds a year (6,000 pounds as a judge, and 4,000 pounds as Speaker of the House of Lords) one half of which is continued to him upon retirement as a pension for life, because, having been in a position to appoint judges, the ex-Lord Chancellor does not return to the practice of law, but remains a judge. In return for his pension, he almost always does judicial duty in the House of Lords or the Court of Appeal until age or infirmity warrant him in declining further service, also having the right, by long-standing custom, unlike any other English Law Lord, of engaging in controversial legislative activity in the House of Lords. See R. M. Jackson, *supra*, footnote 3; *Retrospect, Memoirs of the Rt. Hon. Viscount Simon* (Hutchinson & Co. Ltd. London, 1953), Chapter XIV entitled "The Woolsack", pages 255, 265, and see page 126; *Chambers' Encyclopedia* (Oxford University Press, 1950); *Bouvier's Law Dictionary*.

5. *The Strange Case of Alger Hiss*. By the Earl Jowitt. Doubleday & Company, Inc., Garden City, New York, 1953. $3.95. Pages 371. American publication date, May 28, 1953. Withdrawn and again distributed July 6, 1953. Lord Jowitt says (page 5), "I had sent to me the full transcript of the case" —ten volumes, five of testimony, and five of exhibits—while he was Lord Chancellor, but that he did not have time to study the record until after he left public office. He says it took him three months to read the record and write the book. As to how he got this record, see Toledano, *American Mercury*, July, 1953.

6. Some of these were pointed out by the *London Sunday Times* (Lit. Supp.), May 15, 1953.

To answer all of Earl Jowitt's detailed criticisms would take another book, but enough can be told within the compass of one article to bring out his major reactions to the case and the manifest weaknesses of his argument.

Making, according to the jacket, "no pretense of being wholly objective", Lord Jowitt will possibly create some doubt in some minds of the guilt of Alger Hiss, and of the correctness of the American judicial procedure that was followed in the Hiss trial and conviction. Though stated to be "not an apologia for Alger Hiss", it is, in essence, an argument for the defense and reflects the author's tenderness of Hiss in such expressions as:

> Perhaps [Hiss] was a member of a Communist study group [page 339].
>
> It may, of course, have been that the group [the Ware cell] was in reality little more than an intellectual study group [pages 339-340].[7]

Conceding the almost insuperable handicap of not having seen and heard the witnesses, deploring the pursuit of some collateral issues, yet critical because other collateral issues were not pursued, and attempting to bolster his argument with many matters *dehors* the record which were not before the court and jury, he nevertheless essays to be critical of the result reached by the jury and the trial court and to cast suspicion on the verdict. It may be ventured with a considerable degree of confidence that no American high court judge would by such methods assail the verdict of an English jury.

Was Hiss guilty? Prosecutor Murphy thought he was; and Judge Goddard, who tried the case, told the jury it was a just verdict. The United States Court of Appeals for the Second Circuit, Judges Chase, Swan and Augustus Hand, who affirmed the conviction, must have had no disturbing doubt of Hiss's guilt.[8] The Supreme Court denied certiorari.[9]

Books about famous criminal trials nearly all end the same way: "And so, there you are, dear reader, it is for you to make up your own mind as to whether the defendant is guilty." The present author does that, but he also says that reading of the record leaves him personally in doubt as to the correctness of Hiss's conviction.

The author's criticism of the procedure followed at the trial amounts, in essence, to a criticism of criminal procedure generally in our American federal courts, and therefore deserves considered comment.

Conduct of a Trial Differs in England

Lord Jowitt devotes a good deal of space to the effect that Judge Goddard was loose in the admission of evidence. What of it! The English have their way of arriving at the truth of a matter. We have ours. The Federal Rules of Civil Procedure enjoin us to rule on the side of admission of evidence, rather than exclude evidence, and the Federal Rules of Criminal Procedure breathe the same spirit.[10]

The Lord Chancellor, who, insofar as it appears from *Who's Who*, has never been a trial judge in criminal cases, comments "this would not have been admitted in England", "I would not have admitted this evidence", and so on. If the Lord Chancellor is correct in his statements as to the restrictive nature of the law of evidence in England, then it leaves little to the discretion of the trial judge. The way, Wigmore said, of reaching the truth of a cause, was best to be determined by the trial judge, not by the appellate courts; and that is exactly what the Second Circuit panel said at several places in its opinion affirming Judge Goddard.[11]

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7. Compare the unanimous Report of Senate Internal Security Subcommittee of United States Senate Judiciary Committee, released August 24, 1953, composed of five Republicans and four Democrats, all distinguished lawyers, including the late Willis Smith, past President of the American Bar Association. The report, republished in *U. S. News and World Report*, August 28, 1953, (see especially pages 19, 88, 105), shows that most of the living members of the Ware cell, many of whom attained high government posts (including certain lawyers) invoked the constitutional privilege against self-incrimination in these 1953 hearings. See particularly the testimony concerning the Ware cell of Nathaniel Weyl, who was a member of the cell, but who left the party in 1934, and who kept his one-time communist connections to himself until the Korean conflict induced him to break silence. I. P. R. hearings, pages 2799, 2802. Weyl identified the same persons, including Alger Hiss, as members of the cell who had been earlier named by Whitaker Chambers. Harold Ware's mother was known as the "First Lady of the Communist Party, U. S. A."; and Ware himself worked in the Soviet Union in the collective farm program under both Lenin and Stalin. He came to Washington, D. C., in the early thirties as "agricultural engineer", and became "consultant" to the Department of Agriculture where Alger Hiss was then also employed.

It also seems to his Lordship unreasonable that a bright person like Hiss, in the libel action, "instructed his counsel to press and press again for the production of documents which would destroy him" (page 21). It does not seem to have occurred to Lord Jowitt that after all those years Hiss could feel safe in assuming that they had all been delivered to the Communists by Chambers, or at least were no longer available.

8. *United States* v. *Hiss*, 185 F. 2d 822 (December, 1950). In United States federal court practice, the trial judge, on a motion for acquittal on the ground of insufficiency of the evidence, determines only the question of law whether there is substantial evidence to support a verdict of guilt. In passing on this motion, the trial judge examines the evidence and the inferences reasonably drawn therefrom in the light most favorable to the government, and must let the verdict stand if there is any substantial evidence to support it. However, on motion for a new trial on the ground that the verdict is against the weight of the evidence, the power of the trial judge is much broader, and he may weigh the evidence and consider the credibility of witnesses. If he concludes that the verdict is contrary to the weight of the evidence and that a miscarriage of justice may have resulted, the verdict may, in the trial court's discretion, be set aside and a new trial granted. *United States* v. *Robinson*, 71 F. Supp. 9 (1947); *United States* v. *Barelius* 83 F. Supp. 622 (1949). Denial of a motion for a new trial on the ground that the verdict is against the weight of the evidence, is not subject to review. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 247-248; *Glasser* v. *United States*, 315 U. S. 60, 87; *United States* v. *Johnson*, 327 U. S. 106, 111; *Cavness* v. *United States*, 187 F. 2d 719. On the other hand, a federal appellate court cannot pass on the weight of the evidence, but only on the question of law whether there is any substantial evidence, viewed in the light most favorable to the government, to support the verdict—the same criterion as employed by the trial court on a motion for acquittal. *Mortenson* v. *United States*, 322 U. S. 369, 374 (1943); *Ross* v. *United States*, 197 F. 2d 660, 664-5 (1952), certiorari denied, 344 U. S. 832; *Wilder* v. *United States*, 100 F. 2d 177, 182 (1938); *United States* v. *Sicurella*, 187 F. 2d 533 (1951).

However, in English practice an appeal may be taken to the Court of Criminal Appeal "*on fact or law or both*". R. M. Jackson, footnote 3, *supra*, page 104.

9. *United States* v. *Hiss*, 340 U. S. 948 (March, 1951).

10. There are too many instances of criticism of Judge Goddard's rulings on evidence to set them out. A few page references are pages 37, 117, 204, 221, 270.

11. Note 8, *supra*. See especially footnote 23.

Our critic's heaviest gun is directed at Judge Goddard's failure to sum up the evidence, and the author throws out plenty of suggestions that if Judge Goddard had done this, at least in the manner in which Lord Jowitt might conceivably have done it, the jury might not have convicted; which is no more than saying after reading the record his Lordship doubted Hiss's guilt (page 335); at least guilt was not established beyond a reasonable doubt. American lawyers will be immensely interested in the author's treatment of "reasonable doubt". He seems to cast it off as an unmodern thing.[12]

The author says that summation of the evidence by the trial judge is standard practice in his country, "required", in fact, in every case (page 334). This may be open to doubt.[13]

We know that Judge Goddard considered summation of the evidence, but rejected it:

> I shall not attempt to refer to the testimony and the evidence except in some instances where it may be necessary to advise you as to the particular law applicable, for unless I repeated it at great length I might seem to be unduly stressing evidence which you believed was not so important and omitting portions which you found influenced you.[14]

The trial had lasted two months and a little more.

The Second Circuit had this to say about Judge Goddard's instructions:

> The charge of the court was clear and comprehensive with such due attention to detail in respect to the law relevant to the facts which might be found upon the evidence that all the requests to charge which should have been granted were adequately covered. We find no error in it.[15]

Conduct of the Prosecutor Was Unimpeachable

Lord Jowitt finds quite a bit to criticize in Prosecutor Murphy's conduct. The Court of Appeals said:

> Where a prosecutor is charged with conduct so prejudicial as to amount to reversible error, the charge should be made good by showing a successful effort to influence the jury against a defendant by some means clearly indefensible as a matter of law. It is not enough if there are no more than minor lapses through a long trial.[16]
>
> It is sufficient also to dispose of the attack upon the government's chief trial counsel by referring to what has previously been said in respect to his calling the witnesses Inslerman and Rosen. There was nothing in his general conduct which can justify reversal.[17]

The noble Lord makes much ado that the prosecutor in his closing argument invited the jury's attention to the fact that the same typing errors appeared in the forty-two documents as in agreed samples of typing by Mrs. Hiss. He says that notice should have been given during the trial that the prosecution intended to make this argument, and that this was a matter for expert testimony.

This criticism has been ably answered as follows:

> The Prosecutor took one paragraph in a forty-nine page summation to point out that common errors frequently appeared both in the copies of the secret documents and the agreed samples of typing by Mrs. Hiss. These were "r" for "i", "f" for "g", and "f" for "d". The papers were all in evidence and available for comment by counsel and inspection by the jury. Defense counsel made no objection to the argument. Lord Jowitt suggests that the Prosecutor should have laid a foundation for this argument by expert testimony. But it does not require an expert to identify common errors of that character. The criticism is unfairly stated and unwarranted.[18]

Judge Goddard and Prosecutor (now federal judge) Murphy may well rest content with the accolade of their American appellate superiors.

When the author criticizes the conduct of Judge Murphy in presenting the Government's case, and Judge Goddard's conduct of the trial, and intimates that the result would have been different had they conducted themselves differently, he is impugning (at the minimum) the judgment of two unusually able and experienced men.

The Two-Count Indictment

It does not require much space to demolish the Lord Chancellor's argument that there should be doubt about Hiss's guilt. My Lord's argument is based on a false premise. It disregards, among other things, the fact that Hiss was indicted on two counts and convicted on *both*.

Count One charged perjury, in that Hiss had denied delivery of copies of documents to Chambers; Count Two, Hiss denied that he had seen Chambers after January 1, 1937, a crucial date. Both counts were based on Hiss's testimony before the New York grand jury.

Sensing that he would have difficulties with the second count, the author says, early in his book, that the "substantial portion" of the charges against Hiss had to do with the delivery of documents. But that doesn't take the Second Count out of the case, as Judge Chase in affirming the conviction pointed out.

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12. Page 332. But compare R. M. Jackson (note 3, *supra*) page 106, that the defense "need be no more than a demonstration that the prosecution has failed to show beyond all reasonable doubt that the defendant is guilty". And compare *U. S. ex rel. Marlilia v. Burke*, 197 F. 2d 856 (C. A. 5, 1952), *cert. den.* 344 U. S. 868, that the "beyond a reasonable doubt" test "is all but universally employed, and is as easily understood, without embellishment, by a jury as by a court". Citing 9 Wigmore, *Evidence*, § 2497 (3d Ed. 1940).

13. R. M. Jackson (*supra*, note 3) says (page 122): "The judge's summing up is essentially in the form of 'if you find such and such allegations to be true, your verdict must be so and so,' although to enable the jury to come to their conclusion the judge may review any of the evidence and comment upon it." (Italics supplied). In *Rex v. Roberts* [1942], 1 All. E. R. 187, 28 Cr. App. Rep. 102, it was held by the Court of Criminal Appeal that it was within the discretion of the judge to omit reference to the testimony of certain witnesses, and every judge must be left to sum up in his own way, so long as he does not misdirect the jury in law or fact. This appears to be like the rule obtaining in the United States courts, which derived the power and practice from England. *Heron v. Southern Pac. Co.*, 283 U. S. 91 (1930); *Vicksburg R. Co. v. Putnam*, 118 U. S. 545, 553; *St. Louis Ry. Co. v. Vickers*, 122 U. S. 360 (1886); *U. S. v. Philadelphia, etc. R. Co.*, 123 U S. 113 (1887); *Simmons v. U. S.*, 142 U. S. 148 (1891); *Allis v. U. S.*, 155 U. S. 117 (1894); *Stilson v. U. S.* 250 U. S. 583 (1919); *Quercia v. U. S.*, 289 U. S. 466 (1932); *Arwood v. U. S.*, 134 F. 2d 1007 (C. A. 6, 1943), *cert. den.* 319 U. S. 776; *U. S. v. Cohen*, 145 F. 2d 82 (C. A. 2, 1944), *cer. den.* 323 U. S. 799; *Ladorow v. U. S.* 173 F. 2d 439 (C. A. 9, 1949), *cert. den.* 337 U. S. 25; *Wheeler v. U. S.*, 165 F. 2d 225 (C. A., D. C. 1947).

14. Quoted from "Charge of the Court," C. XXXIII, page 327.

15. 185 F. 2d 833—1st column.

16. 185 F. 2d 832—1st column.

17. 185 F. 2d 833—1st column.

18. Dickerman Williams, former Assistant U. S. Attorney and later General Counsel for the Department of Commerce, in *Freeman*, September 7, 1953.

Corroboration, under the federal law of perjury, was required to support Chambers' testimony about the documents—the first count. The corroboration was that some of the copies were in Hiss's handwriting (admitted by the defense), that all but one of the forty-three typewritten copies had been copied on the old Woodstock typewriter, owned by Mrs. Hiss and kept in the Hiss home—also admitted by the defense.

Now, most of the book's argument is by way of attacking and casting doubt on the admissibility, as well as the probative quality, of this corroborative evidence. *But this all goes to Count One.* No corroboration as to Count Two was required, for there Mrs. Chambers provided the alternative second witness permitted by the federal rule. She testified that Hiss and her husband met and conversed *after* January 1, 1937.

Now, how does the learned Earl deal with this? He says (page 34) if he had been trying the case he would have treated Count Two as a "mere corollary" to Count One, which can only be understood to mean that he would not have permitted Count Two to stand alone; it would have to stand or fall with Count One.

That may possibly be the law of England, but it is not the law of the United States, and the Second Circuit so held.

"Forgery by Typewriter"—a Strange Argument

The phrase "forgery by typewriter" was used by Hiss at the time he was sentenced.

Lord Jowitt says:

> There is, I think, no escape from this conclusion: either Hiss was guilty, or Chambers had at some time gotten access to the typewriter and had either himself or by some agent, caused the forty-three documents produced at Baltimore to be typed on that machine [page 271].

The defense conceded at the trial that the documents were typed on a Woodstock belonging to Mrs. Hiss. The typewriter itself was not available to the Government until the opening day of the trial, *when defense counsel produced it.* The typewriter "was produced upon the trial by the defense and definitely identified by Hiss, Mrs. Hiss and several of the defendant's witnesses as the Hiss typewriter".[19]

Lord Jowitt has been unfortunate in his defendant. After his Lordship used most of 371 pages to show that Chambers could have had access to the Hiss typewriter in the year 1938, Hiss, on motion for a new trial in January of 1952 (more than a year before Lord Jowitt's book appeared) on the ground of alleged newly discovered evidence, abandoned this contention entirely and urged that the Woodstock typewriter offered in evidence by Hiss at the trial, "is not the Hiss machine but is a forgery made to duplicate the work of the Hiss typewriter and used by Chambers to type the Baltimore documents produced by him"; in other words, that Chambers had constructed a *"duplicate typewriter* from the typewritten characters in the Hiss letters, or that it was done for him by some Communist friends"—a claim which Judge Goddard described as "only conjecture, with absolutely no evidence to support it", and which he demolished in a few short sentences.[20] The Court of Appeals concurred in January, 1953,[21] and the Supreme Court denied certiorari in April, 1953.[22]

Quite inexplicably, Lord Jowitt does not mention this amazing development! Not only was he out on a very frail limb, but it has been sawed off behind him!

Sensing at the end of the first trial, that it was a weakness of the Government's case not to be able to produce any person who had seen the Hiss and Chambers families together during the four to five years, 1934—December, 1938, of the alleged family intimacy, Prosecutor Murphy called on the FBI for assistance.

Maid Murray's Testimony

That incomparable agency turned in one of its magnificent investigative feats. Having nothing to start with except the information that the Chamberses had in 1936 employed a colored maid whose first name was Edith, the FBI produced Edith Murray, the maid.

The Hisses denied, as they had at the first trial, ever having been in any home occupied by the Chamberses. Then Mr. Murphy offered Edith Murray *in rebuttal.* She identified both of the Hisses; said both had been at the Chambers' home at Baltimore when she was employed there.

Lord Jowitt does not like rebuttal, but that is not the ground on which he says the Murray testimony would have been excluded in England. He says, in England they do not allow contradiction "as to credit".[23] (Pages 37, 38-39.) Clearly, such an exclusion-

(Continued on page 261)

19. *U. S. v. Hiss,* 107 F. Supp. 128, 131 (July, 1952), opinion of Judge Goddard denying motion for new trial on alleged newly discovered evidence; affirmed 201 F. 2d 372 (January, 1953); *cert. den.,* 245 U. S. 942 (April 27, 1953). Hiss's conviction on January 21, 1950, had become final on denial of certiorari March 12, 1951, and he had surrendered to the U. S. Marshal on March 22, 1951, and was committed. This motion for a new trial was filed after many months of confinement.

20. 107 F. Supp. 128, 134.

21. See footnote 19.

22. See footnote 19.

23. While the English practice has been rather strict since the ruling of Tindal, C. J., in *Regina v. Frost* (1839), 4 St. Tr. (N. S.) 86, 386, against allowing rebuttal testimony by the prosecution, unless a matter "arises ex *improviso,* which no human ingenuity can foresee," "it is possible, with certain restrictions, for the prosecution to call witnesses to rebut the evidence given for the defense" (R. M. Jackson, *supra,* footnote 3, pages 120, 122). And it was held in *Rex v. Crippen* [1911], 1 K. B. 149, 156-159, declining to follow the strictness of Tindal, C. J., that "assuming it to be admissible evidence, it then becomes a question for the judge to determine, in his discretion, whether the evidence, not having been tendered in chief, ought to be given as rebutting evidence. . . . There is no doubt that the matter is one of discretion of the judge at the trial, who is necessarily in a far better position to exercise it with much more ample means of knowledge whether the evidence can be fairly admitted or not than is the Court of Criminal Appeal." See *Rex v. Sullivan,* [1923] 1 K. B. 47; *Rex v. Harris,* [1927] 2 K. B. 587. Wigmore himself might have written the foregoing quotation (4 Wigmore, *Evidence* (2d Ed.) §§ 1867, 1873, which expresses substantially the rule of the American cases cited in the next footnote. But, in practice, British judges, while having the power to allow it, are inclined to restrict rebuttal, seemingly because the Court of Criminal Appeal, with the rarest exceptions, refuses to review rulings on the admission or exclusion of evidence. It is settled, however, that if the defendant gives evidence of good general reputation, the prosecution may rebut with evidence to the contrary. *Regina v. Rowton,* (1865) 10 Cox C. C. 25; and see *Stinland v. Director of Public Prosecutions,* [1944] A. C. 315, 324-6. And the prosecutor may call a witness to disprove an alibi. *Rex. v. Findon,* (1833) 6 C. & P. 132. This latter case gets close to the substance of the testimony of the maid Murray that Hiss was in Chambers' house, after he had denied being there.

The Treaty Power and the Constitution:

The Case Against Amendment

by Brunson MacChesney, Professor of Law, Northwestern University, with the co-operation of **Myres McDougal,** Yale University; **Robert E. Mathews,** Ohio State University; **Covey T. Oliver,** University of California; and **F. D. G. Ribble,** University of Virginia.

■ Professor MacChesney, joined by four other professors of law—Myres McDougal, of Yale, Robert E. Mathews, of Ohio State, Covey T. Oliver, of the University of California, and F. D. G. Ribble, of the University of Virginia, argue that the proposal to amend the Constitution to change the treaty-making power of the President, is both unnecessary and dangerous. Readers of the *Journal* are aware of the fact that the so-called Bricker Amendment, Senate Joint Resolution No. 1, has aroused one of the greatest debates on the Constitution since 1788. In another article, which begins at page 207, Vermont Hatch of the New York Bar, George A. Finch, of the District of Columbia Bar, and Frank B. Ober, of the Maryland Bar, answer Mr. MacChesney and his colleagues.

■ The proposed constitutional amendment, usually called the Bricker Amendment, would restrict the treaty-making power of the United States and the power of the President to make executive and other agreements with foreign nations. It thus presents a constitutional issue which may seriously affect the power of the United States Government to speak for the nation in international affairs and our ability as a people to safeguard our interests in a troubled world. The decision on so grave an issue is not one to be reached blindly or under stress of emotion. It calls for that high standard of reasoned debate and informed judgment which characterized the creation of our Constitution when our nation was born. It is in that spirit that this memorandum will seek to consider the arguments for and against the adoption of the proposed amendment.

Under the title of Senate Joint Resolution 1, it was reported favorably out of the Senate Judiciary Committee on June 4, 1953, by a vote of nine to five, the Chairman of the Senate Foreign Relations Committee being one of the dissenters. It contains five sections, of which only the first three are relevant here, since the last two sections merely set forth the process by which the amendment is to be ratified and the power granted to Congress to implement it. The text actually adopted is essentially the American Bar Association proposal rather than the language of the resolutions Senator Bricker originally introduced. While the American Bar Association has not officially acted on the exact text, its House of Delegates has approved essentially similar language and may be said, therefore, to favor the amendment. That Association's Section of International and Comparative Law has, however, opposed the Bricker proposal, and reaffirmed its position as a Section at the Annual Meeting of the American Bar Association last August.

Several state bar associations have agreed with the House of Delegates. On the other hand, The Association of the Bar of the City of New York, the Federal Bar Association and the Committee on Amendments to the Federal Constitution of the New York State Bar Association have expressed opposition. The lawyers of the country are thus divided on this important question.

The language of the proposed amendment, omitting the implementing clauses, is as follows:

> Section 1. A provision of a treaty which conflicts with this Constitution shall not be of any force or effect.
>
> Section 2. A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty.
>
> Section 3. Congress shall have power to regulate all executive and other agreements with any foreign power or international organization. All such agreements shall be subject to the limitations imposed on treaties by this article. . . .

This proposal has been so frequently discussed as if it contained only the first section—as if its sole objective were the alleged preservation of the Constitution and the Bill of Rights—that it becomes of particu-

This statement was prepared in its original form by these five persons as a memorandum for the guidance of the representative of the Association of American Law Schools on the U. S. National Commission for UNESCO. It has been subsequently revised by Mr. MacChesney in consultation with the others and is now published as their joint opinion.

lar importance to understand it in its entirety. Any proposal to amend the Constitution of the United States surely merits the most thorough deliberation. Since the United States, as the leader of the free world, must be able to deal quickly and effectively in matters of war and peace and foreign trade, proposals to limit the methods of making and enforcing international agreements deserve unusually careful consideration. Moreover, inasmuch as the present Constitution has worked remarkably well in this area, under changing conditions, for more than a century and a half, a heavy burden of proof rests on the proponents of constitutional change. For reasons more fully developed hereafter, the authors of this memorandum believe the burden has not been met and that the proposed amendment is both unnecessary and dangerous.

Before going into our own discussion of these proposals, it might be helpful to indicate the status of the proposed amendment as of the time of writing (December, 1953). Congress adjourned its 1953 session without acting upon it. Prior to adjournment, on July 22, 1953, Senator Knowland, the Acting Majority Leader, introduced a substantially different amendment as a substitute for it. The same day President Eisenhower announced his support of the Knowland Amendment and stated that he was "unalterably opposed" to the Bricker Amendment. In the Judiciary Committee hearings previously held, the Secretary of State, the Attorney General, and other officials of the Eisenhower Administration had expressed their opposition to the Bricker proposals just as had the previous administration.

A word here as to the Knowland proposal is not out of place. Paraphrased, the most important provisions are (1) that any treaty or other agreement in conflict with the Constitution shall be of no effect, and (2) that, in case the Senate so provides in its consent to ratification, a treaty can only become operative as internal law by the enactment of appropriate legislation by Congress.[1] While it may be correctly suggested that this no more than restates the present situation and is therefore unnecessary, it is our opinion that its adoption could introduce harmful uncertainties into the process of agreement-making. Its language contains ambiguities, and since it has not as yet been the subject of a committee hearing, there has been no development of the intent of the drafters. Moreover, if its first section can be construed to incorporate the idea now found in the "which clause" in Section 2 of Senator Bricker's proposal, all the dangers that will be pointed out as latent in that clause would be present here as well. Further, it shares with the Bricker proposal the grave disadvantage of creating doubts in other nations as to our power and intent in the making of treaties and other agreements.

It is now our purpose to set out with necessary brevity the principal contentions of the proponents of the Bricker Amendment, the answers of those who oppose it, together with a brief enumeration of the dangers which, in our view, would result from its adoption. The effects of the amendment as a whole will be assessed. We shall discuss subsequently the specific issues relating to each section and then state our conclusions.

I.

The Proposed Amendment as a Whole

It is not inaccurate to say that opposition to the adoption of the Genocide Convention and the draft Covenant on Human Rights was a principal source of support for the present proposal. Proponents of the Bricker Amendment purported to see in these proposed treaties violations of constitutional rights and invasions of the rights of the states through the use of an unlimited treaty power. The present administration has stated it will not seek to adopt either of these treaties, and the Covenant on Human Rights has not even been completed in the United Nations.

The continued advocacy of the present amendment rests, we believe, on three basic attitudes. The first is that none of the three great branches of government can be trusted to observe the spirit of the Constitution, and that specific curbs must therefore be written into that document in order to prevent abuse. The second is that the increasing need for international agreement on matters which could in the past have been left to the states should not be permitted to change the existing division of federal and state powers in domestic affairs, but, on the contrary, that the national supremacy in treaty matters, expressly provided for by the framers of our Constitution, should be abandoned in favor of the general concept of state participation in treaty making which was one of the fatal weaknesses of the Articles of Confederation. The third is that the existing power of the executive in foreign affairs should be curbed and complete control over agreements with other nations should be vested in Congress.

The opponents of the amendment believe that these three basic attitudes are unwise and unwarranted. With respect to the first attitude, it is axiomatic that in the process of government we must trust somebody. There seems no reason to suppose that we may not trust any of our three branches of government; indeed, if we could not, it would be but a futile gesture to put our faith in a Constitution however carefully worded. The Senate has been tradi-

1. It also attempts to restate the judicial power of the United States, and provides for a roll-call vote on treaties. The text of the Knowland Amendment, omitting the implementary clause, is as follows:

Section 1. A provision of a treaty or other international agreement which conflicts with the Constitution shall not be of any force or effect. The judicial power of the United States shall extend to all cases, in law or equity, in which it is claimed that the conflict described in this amendment is present.

Section 2. When the Senate consents to the ratification of a treaty the vote shall be determined by yeas and nays, and the names of the persons voting for and against shall be entered on the Journal of the Senate.

Section 3. When the Senate so provides in its consent to ratification, a treaty shall become effective as internal law in the United States only through the enactment of appropriate legislation by the Congress.

tionally cautious and conservative in giving its approval to treaties; there appears no reason to fear that it will cease to afford adequate protection in the future. The fact that the Senate and the President together have never approved a treaty subsequently held unconstitutional should be cause for confidence in both the executive and the legislative branches of the government. The further safeguard inherent in the ability of the whole Congress to control the effect of international agreements through the powers of appropriation, implementation and supersession internally of undesired provisions of such agreements will be discussed below. Finally, there appears not the slightest reason to suppose that the courts will abdicate their traditional function of determining whether any fundamental constitutional guarantees have been violated by any type of international agreement.

So far as the second attitude is concerned, the amendment is in fact a drastic proposal that would erase the basic principle of national supremacy in international affairs in a federal form of government, a principle that was considered crucial by the framers of our Constitution, and is even more clearly so today. If this attitude should prevail, the nation's power to represent effectively American interests in international matters would be dangerously crippled and its practical ability to function would be seriously hampered.

Thirdly, the proposal to curb the executive and enhance the power of Congress is an extreme attempt to change the principle of separation of powers as it was envisaged by the framers of our Constitution. This proposal would deprive the nation of a traditional method of agreement-making that provides the speed and occasional secrecy required in emergencies. In the light of the impotence in foreign policy of nations such as France in which the legislature is, as a practical matter, supreme in foreign affairs, it would be the height of folly so to provide in the Constitution of the leader of the free world.

II.

The Proposed Amendment, Section by Section

Section 1—Issues and Arguments

Section 1 of the proposed amendment reads as follows:

> A provision of a treaty which conflicts with this Constitution shall not be of any force or effect.

The principal issue presented by Section 1 of the proposed amendment is whether existing doctrine of the United States Supreme Court, that a treaty may not override fundamental constitutional guarantees, is a sufficient safeguard or whether it is desirable to state this doctrine explicitly as an amendment to the Constitution.

Arguments for and against Section 1.

The main argument advanced for this section by the proponents of the amendment is that under presently existing law, treaties can override the provisions of the Federal Constitution. More specifically, this contention takes two principal forms:

1. The first of these rests on the wording of the First Amendment: "Congress shall make no law respecting an establishment of religion", or abridging such other liberties as freedom of speech and of the press. The argument runs as follows: Since the restriction applies only to "Congress" (a term that comprises both Houses together), and since at present by the language of Article II of the Constitution the treaty power is vested in the President and the Senate alone (rather than in the President and the whole Congress), therefore the First Amendment does not serve to restrict the treaty power.

This contention is believed to be erroneous and completely untenable. So narrow a construction would except from the operation of the First Amendment many activities of the Federal Government which the courts have frequently recognized to be subject to it, such as the acts of the President, of territorial legislatures, of the federal courts and of one branch of the Congress.[2] Furthermore, just as the due process clause of the Fourteenth Amendment restricts all functions of a state government, so the similar clause in the Fifth Amendment restricts all functions of the Federal Government, one of which is the making of treaties.[3] The Fifth Amendment in our opinion clearly covers the point, but if it does not, the sensible remedy would be to change the language of the First Amendment and not to cripple the treaty power to accomplish the stated purpose of the proponents. Furthermore, even were this not so under the First and Fifth Amendments, the Congress itself has unquestioned power to protect our citizens against any infringement of their constitutional rights by a treaty or executive agreement, as it always can supersede the internal consequences of any agreement by a later enactment.[4] It has always been held that an act of Congress is superior to a prior treaty (and, of course, supersedes an executive agreement[5] also). Thus, under existing constitutional provisions, Congress can always give internal protection, even though the agreement remains binding internationally, and therefore this remedy must be used sparingly. Nonetheless, this is a sufficient safeguard against any possible improvident agreements and makes it clear that the adoption of Section 1 of the proposed amendment is unnecessary for this purpose.

2. The second form of contention is that the statement in Article VI

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2. *Rumely v. U. S.*, 345 U. S. 41, 73 S. Ct. 543 (1953).

3. See Edgerton, J., in a dissent on other grounds, who stated in *Joint Anti-Fascist Refugee Committee v. Clark*, 177 F. 2d 79 (1949), at page 87, "Read literally, the First Amendment of the Constitution forbids only Congress to abridge these freedoms. But as the due process clause of the Fourteenth Amendment extends the prohibition to all state action, the due process clause of the Fifth must extend it to all federal action."

4. *Moser v. United States*, 341 U. S. 41, 71 S. Ct. 553 (1951), is one of the latest cases to that effect.

5. In fact, there is reason to believe that an executive agreement must be consistent with prior acts of Congress. See *United States v. Guy W. Capps, Inc.*, 204 F. 2d 655 (4th Cir. 1953), appeal pending. See also Sutherland, "The Bricker Amendment, Executive Agreements, and Imported Potatoes", 67 *Harv. L. Rev.* 281 (1953).

(the "Supremacy Clause") of the Constitution that "This Constitution and the Laws of the United States which shall be made in *Pursuance* thereof and all treaties made under *Authority* of the United States, shall be the supreme Law of the Land" (italics added), implies that, though statutes must be enacted pursuant to the Constitution, treaties need not be, but may prevail over it.

This textual argument is believed to be utterly without substance on the basis of all historic records and Supreme Court decisions. It is well known that the reason for the difference in the emphasized language was to include treaties made prior to adoption of the Constitution by the *authority* of the United States under the superseded Articles of Confederation. The Supreme Court has repeatedly stated, either expressly or by implication, that treaties are subject to the Constitution. Thus:

> It would not be contended that [the treaty power] extends[6] so far as to authorize what the Constitution forbids. . . .
>
> It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument.[7]

Mr. Justice Holmes expressly denied any intent to imply that there were no constitutional limitations upon the treaty power in an opinion in a famous case often cited by the proponents as supporting their argument:

> We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. . . . The treaty in question does not contravene any prohibitory words to be found in the Constitution.[8]

Nor is the judiciary the only branch of government to have taken the position that treaties can not override fundamental constitutional rights. Responsible members of the executive branch have repeatedly taken the same attitude. The positions of Secretaries of State Marcy and Blaine are representative.[9]

Conclusion as to Section 1.

The foregoing arguments and authorities make clear, we believe, that the proposed Section 1 is merely an attempted restatement of the existing doctrine of constitutional law and that it is therefore unnecessary. There is no more need to include this doctrine in the Constitution[10] than there would be the doctrine of *Marbury* v. *Madison*. Furthermore, there is always danger, as lawyers raised in a common law system are particularly aware, of attempting to codify the meaning of existing judicial decisions. The Supreme Court in construing the proposed amendment might find that some different meaning was intended and thus either add to or subtract from the existing law. There might be, for example, the possibility, although we believe it improbable, that the language of Section 1 could be construed as incorporating the idea contained in the "which clause" of Section 2. In such an event, Section 1 would be dangerous for the same reasons that will be noted shortly in the discussion of Section 2. If, as Senator Bricker appears to contend, this section is intended to be retroactive, the possibilities of ambiguity and confusion are further compounded. For all these reasons it is our opinion that the proposed section is both unnecessary and possibly harmful.

Section 2—Issues and Arguments

Section 2 of the proposed amendment reads as follows:

> A treaty shall become effective as internal law in the United States only through legislation *which* would be valid in the absence of treaty. [Italics added.]

Section 2 raises two distinct issues that will be discussed separately. The first, presented by the language of the Section up to the word "which", concerns the necessity for congressional legislation prior to treaties having any internal effect. Literally, "legislation" may include state legislation, although congressional legislation seems clearly to have been intended. This ambiguity is an additional difficulty with this aspect of the section. The second issue, raised by the wording of the "which" clause, is whether congressional power to implement treaties should be restricted to its delegated powers apart from the treaty power.

A. *The Internal Effect of Treaties*

The first issue raised by Section 2 (up to the "which" clause) is whether the Constitution should be amended to require enabling legislation by Congress before any treaty can become effective as internal law within the United States, or, as indicated above, possibly legislation by the states. Phrased differently, the question is whether the present operation of the supremacy clause in making certain treaties immediately effective, without the necessity for enabling legislation, should be changed by the amendment.

Arguments For and Against

To comprehend the arguments for and against this part of the proposal, it is necessary to understand how the supremacy clause (Article VI) operates at the present time. As interpreted by the United States Supreme Court, that clause makes treaties, once they are ratified with the approval of the Senate and are operative internationally, immediately enforceable in state and federal courts if their terms show such intent. In such case the treaty is said to be "self-executing". If immediate effectiveness was not so intended, then congressional implementing legislation is necessary before the courts will enforce the treaty. The Supreme Court ultimately decides which consequence was intended on the basis of the language used in the treaty.

The proponents of the amendment contend that *no* international agreement should be self-executing within the United States for several reasons.

1. They claim that the present system is undesirable because state and federal legislation may be overridden through this "self-executing"

(Continued on page 248)

6. *Geofroy* v. *Riggs*, 133 U. S. 258 (1890), at 267.
7. *The Cherokee Tobacco*, 11 Wall. 616 (1870), at 620-21.
8. *Missouri* v. *Holland*, 252 U. S. 416 (1920), at 433.
9. V Moore, *International Law Digest*, pages 167 and 169 (1906).
10. Cowles, *Treaties and Constitutional Law* (1941), reached a similar conclusion in a careful study made prior to the present controversy.

The Treaty Power and the Constitution

The Case for Amendment

by **Vermont Hatch** of the New York Bar, in collaboration with **George A. Finch** of the District of Columbia Bar, and **Frank B. Ober** of the Maryland Bar

■ To assure supremacy of the Constitution over treaties; to prevent distortion of the treaty power through its use as a device to enlarge federal power at the expense of the states; to effectuate domestic reforms, and to accomplish things "that in substance, if not in form" are "un-American"; and to prevent international executive agreements from accomplishing what a treaty could not do—these are the primary objectives of the Bricker Amendment.

These are considerations of the utmost importance to everyone because, unlike most other countries,[1] our Constitution provides that treaties become the supreme law of the land, our domestic law, overruling state laws and constitutions, and because, of late, certain international agreements made by the Executive without the concurrence of either house of Congress, although nowhere mentioned in the Constitution, have been raised to a similar dignity in overriding state law.

The subject has become vastly more important in the last decade because of the impetus given by the United Nations to the formulation of treaties for the international regulation, supervision and control of the most fundamental everyday rights and relationships of individuals and for the erection of international bodies and organizations to supervise, regulate and enforce such treaties.

In Charles Henry Butler's work *The Treaty-Making Power of the United States* (1902) Volume I, page 5, the author expressed the opinion:

> *First*: That the treaty-making power of the United States, as vested in the Central Government, *is derived not only from the powers expressly conferred by the Constitution, but that it is also possessed by that Government as an attribute of sovereignty,* and that it extends to every subject which can be the basis of negotiation and contract between any of the sovereign powers of the world, or in regard to which the several States of the Union themselves could have negotiated and contracted if the Constitution had not expressly prohibited the States from exercising the treaty-making power in any manner whatever and vested that power exclusively in, and expressly delegated it to, the Federal Government. [Italics added.]

The thesis of Mr. Butler was adopted in substance in 1936 by Mr. Justice Sutherland in *United States* v. *Curtiss-Wright*,[2] when he stated that the power to make treaties would have vested in the Federal Government as a necessary concomitant of nationality *if it had never been mentioned in the Constitution.*

This would be a treaty power, in part at least, above and beyond the Constitution.

Mr. Butler's thesis was challenged by Henry St. George Tucker in his work *Limitations on the Treaty-Making Power* (1915) at length, but pithily in these words (page 98):

> If such power existed independently of the Constitution, the inquiry is certainly pertinent, why was the grant of power ever given in the Constitution? Why grant what already existed?

In *Missouri* v. *Holland*, Mr. Justice Holmes stated:[3]

> To answer this question it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article II, § 2, the power to make treaties is delegated expressly, and by Article VI treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land.

In 1945 Professor Myres S. Mc-

1. 1953 Hearings on S.J.Res. 1 and S.J.Res. 43 (hereafter called "1953 Hearings"), page 1121.

2. 299 U.S. 304, 318. "Much of the Court's opinion is dictum. . . ." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635, footnote 2 to Mr. Justice Jackson's opinion. But as stated at the outset the implications of the language must be taken into account as indicating an unlimited treaty power above and beyond the Constitution and therefore unrestrained thereby. The next year (1937) Justice Sutherland in the case of *U.S.* v. *Belmont*, 301 U.S. 324, declared an executive agreement, made by the President alone, of equal status with a treaty under the Supremacy Clause in its effect in overruling state laws and Constitutions; and five years later (1942) *U.S.* v. *Pink* (315 U.S. 203) reaffirmed this doctrine. As noted earlier executive agreements are nowhere mentioned in the Constitution. These cases will be considered *infra*.

3. *Missouri* v. *Holland* (1920), 252 U.S. 416, 432.

Dougal of the Yale Law School wrote:

> But whatever the rationale used, it is perfectly clear that in the conduct of our international relations, the powers of the Federal Government are ample to deal with any problem, because they derive not only from the Constitution, but "from the necessities of the case."[4]

Finally in 1952 the present Secretary of State asserted that treaties "can override the Constitution".[5]

Here then are the basic and fundamental questions: Is the treaty power derived from the Constitution *and to be construed as an integral part of and in harmony with the other provisions of that instrument* or is it derived in whole or in part from a totally different source and, in either event, is it subject to constitutional limitations? This should be kept in mind at every stage of any discussion of the Bricker Amendment.

On February 26 and September 18, 1952, the House of Delegates of the American Bar Association recommended to the Congress for consideration the text of a proposed amendment to the Constitution of the United States in respect of the treaty-making power and on September 18, 1952, the text of a proposed amendment in respect of executive agreements.[6]

On June 4, 1953, after extended hearings in 1952 and in 1953 on Senate Joint Resolutions on the subject introduced by Senator Bricker of Ohio on February 7, 1952, and January 7, 1953, and by Senator Watkins of Utah on February 16, 1953,[7] the proposed Amendment in its present form was reported favorably to the Senate by a vote in the Committee on the Judiciary of five Republicans and four Democrats in favor to three Democrats and two Republicans against.[8] The text of the Amendment, so proposed by the Senate Judiciary Committee, follows closely the American Bar Association proposal.

At the Annual Meeting of the American Bar Association in August, 1953, the Section of International and Comparative Law offered in the House of Delegates[9] a resolution which, if adopted, would have put the American Bar Association on record as opposing the Amendment in its present form, but that motion was defeated after prolonged debate by a vote of almost four to one (117 to 33).[10]

Readers of this JOURNAL are well aware that Article II, Section 2 of the Constitution vests the power to make treaties in the President, not alone but "by and with the advice and consent of the Senate, provided two-thirds of the Senators present concur".

Article VI, paragraph 2 reads:

> This Constitution, and the Laws of the United States which shall be *made in Pursuance thereof;* and all Treaties *made, or which shall be made, under the Authority of the United States,* shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding [Italics added].

Article I, Section 1 provides:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Article I, Section 8, Clause 12 confers on Congress power

> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, *or any Department or Officer thereof* [Italics added].

The Constitution will be searched in vain for any mention of or reference to executive agreements.

The Constitution has been amended twenty-two times—twelve times in addition to the Bill of Rights which was adopted out of fear of the powers given by the Constitution to the Federal Government; and

The Tenth Amendment provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The Supreme Court has stated that the purpose of the Tenth Amendment was "to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers"—a statement wholly incompatible with the idea that there are no such reserved powers beyond the reach of the Federal Government.[11]

A good deal of confusion can be eliminated by a statement of what the Bricker Amendment would not do.

First—It would not affect the method of negotiating or ratifying any treaty.

Second—If a treaty did not conflict with the Constitution, the Amendment would not affect it in any way unless it attempted to change the internal law of this country.

Third—It would not prevent any treaty from being self-executing law by its own terms—unless it would change our internal law.

It would affirm the power of Congress, which is probably a power

4. "Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy", by Myres S. McDougal and Asher Lans, 54 *Yale L. Jour.* 181, 534 at 260 (hereafter referred to as McDougal and Lans).

5. 1953 Hearings page 862; *cf.* 39 *A.B.A.J.* 1064 (1953).

6. 77 *A.B.A. Rep.*, pages 447 and 122.

7. S.J.Res. 130, 82d Cong., 2d Sess.; S.J.Res. 1, 83d Cong., 1st Sess.; and S.J.Res. 43, 83d Cong., 1st Sess.

8. Senate Report No. 412, 83d Cong., 1st Sess., with Minority Views. Those voting favorably were Jenner (R.) Indiana; Watkins (R.) Utah; Hendrickson (R.) New Jersey; Welker (R.) Idaho; Butler (R.) Maryland; McCarran (D.) Nevada; Eastland (D.) Mississippi; Johnson (D.) South Carolina; and McClellan (D.) Arkansas. Senator Dirksen (R.) of Illinois would have voted favorably had he not been absent on official business. Opposed were: Kefauver (D.) Tennessee; Kilgore (D.) West Virginia; Wiley (R.) Wisconsin; Hennings (D.) Missouri; and Langer (R.) North Dakota.

9. 39 *A.B.A.J.* 1034.

10. 39 *A.B.A.J.* 1036. The House of Delegates is the body vested by the Constitution of the American Bar Association with control and administration of that Association and its membership includes one or more representatives from every state in the Union.

11. *U.S. v. Darby*, 312 U.S. 100, 124 (1941). Judge Charles C. Nott of the Court of Claims asserted, however, that this was a clause ". . . which politically has made much mischief during these 125 years, but which under the necessities of judicial construction has amounted to nothing . . . ." 7 *Encyclopedia Americana* (1939 ed.) page 568.

which Congress already has, to regulate executive agreements. Except for that, unless an executive agreement were either in conflict with the Constitution or sought to change our domestic law, the Amendment would not affect it.

Section 1 of the Bricker Amendment reads:

> A provision of a treaty which conflicts with this Constitution shall not be of any force or effect.

Section 1 was thus designed to declare that the treaty power could not override the other provisions of the Constitution but must operate in harmony with them. It would also give the courts a clear constitutional basis for declaring, and the power to declare a treaty provision void if it should *conflict* with the Constitution.

Some Arguments of Opponents of the Amendment

It is stated by many who oppose the Amendment that this Section is the law today;[12] that there is no need to amend the Constitution to say so; and that there is danger in even the attempt to codify the alleged existing rule lest the courts find a different meaning from that intended. This last argument deserves little attention,[13] but it strongly suggests that opinions may differ fundamentally as to what is meant by "conflicts with the Constitution". This may be the root of much of the opposition to Section 1. (Opponents who believe that the treaty power derives from a source other than the Constitution, would of course object to Section 1.)

To illustrate: the State Department has said

> The treaty-making power is a constitutional power, and as such cannot possibly violate the Constitution.[14]

This could mean either (a) that the treaty power, springing from the Constitution itself, cannot accomplish ends at variance with the Constitution's other provisions or (b) that, since the treaty power is delegated by the Constitution without explicit limitation, nothing that a treaty can accomplish can be at variance with the Constitution.

Proponents of amendment believe the law should be in accordance with the first interpretation and that Section 1 of the Amendment would mean just that.

Is that the law today? Can it be possible that the second interpretation—an omnipotent treaty power—is today's status? What, if any, limitation can be said to apply to the treaty power as of now?

Suppose opponents of amendment should state clearly that there was no limitation on the treaty power contained in the rest of the Constitution! Then indeed would the case for amendment be unassailable.[15] But usually opponents claim that there are limitations. In general it is said that the treaty power is unlimited (a) if it deals with a subject of real international concern and (b) does not run contrary, some say to constitutional prohibitions,[16] others say to fundamental or basic constitutional guarantees, still others to constitutional limitations in favor of private rights.[17]

It becomes immediately obvious that any matter can be made one of international concern ("real", if you will) by the mere device of our State Department, getting any other government at all interested enough to be willing to make a treaty with us on the subject.[18]

So that the first suggested element of limitation on the treaty power is in fact one that can be made to order by the power it is alleged to limit.

The very variation in the statement of the other suggested requisite, by different opponents, and even by the same people at different times, and the lack of clarity as to exactly what is meant by those statements makes it impossible to believe that there could be a basis here for limitation on the treaty power which could be relied on with any degree of assurance, if indeed it exists at all.

From the earliest times courts have indicated that it was doubtful whether they had the power to pass upon the constitutional validity of treaties.[19] It has been said that the making of treaties "being an exercise of the political power" they are not the official concern of the courts except as to their existence and construction.[20]

If the courts cannot pass on the constitutionality of treaties, what constitutional limitation exists?

There is no explicit limitation on treaties in the Constitution and no treaty has ever been declared unconstitutional.

Professor Zechariah Chafee, Jr., of Harvard, met the issue squarely in 1952. He said flatly that the Supreme Court had never squarely decided

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12. "It is unobjectionable in itself, but unnecessary." Chafee, *Harvard Law School Record*, February 21, 1952; *8 Record of The Assn. of the Bar of the City of N.Y.*, No. 9, page 22; Statement of Position on The Bricker Amendment by Committee for Defense of the Constitution by Preserving the Treaty Power accompanying letter of December 29, 1953; *N. Y. Times*, editorial January 7, 1954, page 30, column 2.

13. The argument proceeds on two basic fallacies: (1) that existing law cannot be successfully codified because the courts may well find a different meaning due to the attempt to codify, and (2) that the courts will not have, or will not avail themselves of the legislative history of a codification to ascertain its true purpose.

14. 1953 Hearings, page 830. (The phrase is quoted for illustrative purposes only and not to interpret its intended meaning.)

15. There are, as indicated, apparently two schools of thought among opponents, first, those who agree with Mr. Butler and the dictum of Justice Sutherland, and second, those who regard the treaty power as a delegated power exclusively.

16. See, for example, Report of Committee on Federal Legislation and Committee on International Law of The Assn. of the Bar of the City of N.Y., dated April 28, 1952 (hereafter referred to as 1 City Bar) at pages 12 and 16.

17. Constitution of the United States of America, Revised and Annotated 1953, edited by Professor Edwin S. Corwin, at page 429.

18. See June, 1952 Report of the Committee on Amendments to the Federal Constitution of the New York State Bar Association, page 17.

19. *Ware v. Hylton*, 3 Dall. 199, 237 (U.S. 1796); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918); see also *U.S. v. Reid*, 73 F. 2d 153, 155 (9th Cir. 1934).

20. *U.S. v. Domestic Fuel Corporation*, 71 F. 2d 424, 430 (1934); *Z. & F. etc. v. Hull*, 114 F. 2d 464, 468 (D. of C., 1940), particularly footnote 13.

Attorney General Brownell assumes that the courts could declare a treaty unconstitutional, 1953 Hearings, pages 946, 913, 935. The Secretary of State, Mr. Dulles, apparently so assumes (*id.* page 878), although how this can be true in view of his quoted statement that treaties "can override the Constitution" is not clear. The Supreme Court said, in *U.S. v. Pink*, 315 U.S. 203, 222 (1942): "This Court, speaking through Mr. Justice Sutherland, held that the conduct of foreign relations is committed by the Constitution to the political departments of the Federal Government; that the propriety of the exercise of that power is not open to judicial inquiry. . . ."

whether the treaty power is subject to constitutional limitation.[21]

As to the argument founded on dicta of the Supreme Court made years ago, principally the dictum in *Geofroy* v. *Riggs*, 133 U. S. 258 (1890), that a treaty may not do what the Constitution expressly forbids, Professor Sutherland, of the Harvard Law School, wrote in 1952:

> President Coolidge and the Senate evidently thought that a treaty could prevail over at least one amendment.[22]

He was referring to a treaty made in 1924 permitting British ships to transport liquor as sea stores without penalty in the teeth of prior decision of the Supreme Court saying:

> This is prohibited transportation and importation in the sense of the Amendment [the Eighteenth] and the act.[23]

When it was sought to challenge that treaty as doing what the Constitution expressly forbade, the courts dismissed saying that there were no sufficient allegations of damage to the appellants or their proprietary rights as to warrant the inquiry.[24]

So at least one treaty apparently has flown in the face of explicit constitutional prohibition after the prohibition was interpreted by the Supreme Court.

Thus there is no assurance that even a constitutional prohibition limits the treaty power.

If prohibitions in the Constitution were in fact the only limitation on treaty power, could a self-executing treaty (which is not a law of Congress) infringe on the First Amendment providing "Congress shall make no law respecting an establishment of religion" or abridging freedom of speech or of the press? The prohibition would not fit.

Opponents of amendment challenge this suggestion and their challenge will be dealt with *infra*. It is referred to here to illustrate the difficulties opponents labor under in trying to define constitutional limitations on the treaty power alleged to exist at the present time when the Supreme Court has never clearly decided that there is any such limitation. This may also explain why some opponents speak of constitutional prohibitions, others of basic constitutional guarantees and others of specific limitations in the Constitution in favor of private rights.[25]

The suggestion that basic or fundamental constitutional guarantees or constitutional limitations in favor of private rights are limiting factors are far less specific than constitutional prohibitions and quite unsatisfactory.

The dicta in the cases of *Geofroy* v. *Riggs*, *The Cherokee Tobacco* and *Missouri* v. *Holland* (frequently cited on treaty limitation) speak of "what the constitution forbids", "cannot change the Constitution or be held valid if it be in violation of that instrument", and not contravening "any prohibitory words".

The founding fathers knew the word "guarantee". They used it exactly once in the entire Constitution, when, in Article IV, Section 4, it was provided:

> The United States shall guarantee to every State in the Union a Republican Form of Government. . . .

and "It is well settled that questions arising under" that "clause are political, not judicial, in character and thus are for the consideration of the Congress and not the courts".[26]

The constitutions of some other nations, with ideas radically different from ours as to the source of rights of the individual, confer or guarantee in terms certain of these rights. Ours does not.[27] The phrase "constitutional guarantees" although often used is not a happy one.

Further examination of some of the positions taken by opponents will further demonstrate the lack of precise conviction as to where, if at all, limitations in the treaty-making power may be said to lie.

In a work edited by Professor Edward S. Corwin the following appears:

> Our system being *theoretically* opposed to the lodgement anywhere in government of unlimited power, the question of the scope of this exclusive power has often been pressed upon the Court, which has sometimes used language *vaguely suggestive of limitation*, as in the following passage from Justice Field's opinion for the Court in *Geofroy* v. *Riggs*, which was decided in 1890. . . .[Italics added].

And

> Justice Sutherland's later assertion in the *Curtiss-Wright* case that the powers "to declare and wage war, to conclude peace, to make treaties," etc., belong to "the Federal Government as the necessary concomitants of nationality" *leaves even less room for the notion of a limited treaty-making power*, as indeed appears from his further statement that "as a member of the family of nations, the right and power of the United States . . . are equal to the right and power of the other members of the international family". No doubt there are specific limitations in the Constitution in favor of private rights which "go to the roots" of all power. But these do not include the reserved powers of the States; *nor do they appear to limit the National Government in its choice of matters concerning which it may treat with other governments.* [Italics added].[28]

(Continued on page 252)

21. "No doubt, the question whether the treaty power is subject to constitutional limitations has never been squarely decided by the Supreme Court, because fortunately no American treaty has come near enough to violating the Constitution to make the issue worth litigating." *Harvard Law School Record*, February 21, 1952, column 4.

22. "Restricting the Treaty Power", 65 *Harv. Law Review* 1305, 1319 (1952).

23. *Cunard S.S. Co.* v. *Mellon*, 262 U.S. 100 (1923). It has been suggested that since Congress exempted traffic through the Panama Canal and over the Panama railroad a treaty could properly make this exemption, but the time sequence refutes the argument: The Eighteenth Amendment was ratified effective January 29, 1919; the National Prohibition Act was passed October 28, 1919; the *Cunard* case was decided in 1923 and the treaty made thereafter in 1924. The decision probably called for revision of the enforcement statute rather than for an exception in the face of the prohibition.

24. *Milliken* v. *Stone*, 16 F. 2d 981, 984 (1927), *cert. den.*, 274 U.S. 748 (1927).

25. See footnotes 16 and 17, *supra*.

26. Constitution of the United States, Revised and Annotated, 1938 ed. page 548.

27. Constitutional concepts should not be expressed in ambiguous terms. Our Constitution "recognizes" and "protects" certain of our "unalienable rights", with which we are endowed by our Creator. The word "guaranteed" was, perhaps for that very reason, abandoned in the Draft Covenant on Civil and Political Rights in favor of "recognized or existing". Article 18, Commission on Human Rights, Report of the Seventh Session (16 April-19 May 1951), page 22, as quoted in footnote 1 page 8 of 1 City Bar; Article 4 Section 2 of Draft Covenant on Human Rights—Economic, Social and Cultural Rights, *United Nations Bulletin*, September 1, 1952, page 254.

28. Corwin, cited *supra*, note 17, at pages 428, 429.

Legal Education for Practice:

What the Law Schools Can Do and Are Doing

by **George Neff Stevens** • Dean of the School of Law of the University of Washington

■ The problem of making it easier for the law student to make the transition from the academic to the practical world upon being called to the Bar continues to be the subject of debate and worry. The pages of the *Journal* have carried a number of articles on the subject expressing a wide variety of opinion from many points of view. Dean Stevens' article contains both a defense of the present curricula of the law schools and a statement of what is being done in many schools to meet the criticism that legal education is too theoretical and fails to prepare the student for practice.

■ Dean Albert J. Harno has published, for the Survey of the Legal Profession, a masterful and thought-provoking book entitled *Legal Education in the United States.* This is a *must* for every lawyer. Dean Harno points out, among other things, that the question as to whether or not law schools are doing a good job cannot be answered until we agree what they are supposed to be doing. The real need, then, is for a determination of the aims and objectives of legal education. And Dean Harno rightly states that this is the joint task of lawyers, judges, bar examiners and law school men.

Several recent articles in the AMERICAN BAR ASSOCIATION JOURNAL have taken the law schools to task for failure to produce graduates ready and able to practice law—the willingness is conceded.[1] The gist of these charges has been that our graduates are not properly trained in "know how". An excellent reply to this position, by Dean Joseph A. McClain, Jr., of Duke University Law School, appeared in a recent issue of the JOURNAL.[2]

Normally, this should end the matter. But, the problem is deeper. Law teachers and lawyers have drifted apart. In the above work, Dean Harno discusses the need for *"Rapprochement* between Law Teachers and Practicing Lawyers". Bad public relations caused by poor communication between the two groups is largely responsible. The purpose of this paper is to give the practicing lawyers a bit more information as to what the law schools are doing so that they, the lawyers, can better determine what law schools ought to do.

What are the reasons assigned by

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1. Silver, "Law Students and the Law: Experience-Employment in Legal Education", 35 *A.B.A.J.* 991 (1949); Roberts, "Performance Courses in the Study of Law: A Proposal for Reform of Legal Education", 36 *A.B.A.J.* 17 (1950); Connor, "Legal Education For What?: A Lawyer's View of the Law Schools", 37 *A.B.A.J.* 119 (1951); Cutler, "Inadequate Law School Training: A Plan to Give Students Actual Practice", 37 *A.B.A.J.* 203 (1951); Cantrall, "Law Schools and the Layman: Is Legal Education Doing Its Job?" 38 *A.B.A.J.* 907 (1952). See also, Judge Jerome Frank, "A Disturbing Look at the Law Schools", 2 *J. of Leg. Ed.* 189 (1949); Vanderbilt, "The Responsibilities of Our Law Schools", 3 *J. of Leg. Ed.* 207 (1950); Mr. Justice Robert H. Jackson, "Training the Trial Lawyer: A Neglected Area of Legal Education", 3 *Stan. L. Rev.* 48 (1950); Coughlin, "Law School Curricula—A Proposal", 24 *N. Y. St. Bar Bul.* 303 (1952).

2. McClain, "Is Legal Education Doing Its Job? A Reply", 39 *A.B.A.J.* 120 (1953), and see Hornstein, "A Lawyer Looks at the Law Schools", 1 *J. of Leg. Ed.* 516 (1949); Laylin, "A Practicing Lawyer Looks at Legal Education", 11 *Oh. St. L.J.* 32 (1950); John G. Hervey, "Preparation for the Legal Profession", 23 *Rocky Mt. L. Rev.* 4 (1950); Judge Charles E. Clark, "Practical Legal Training and Illusion", 3 *J. of Leg. Ed.* 423 (1951).

some of these recent writers for the failure of the law schools to produce a better product? First, it is said that teachers of law are "sincere but inexperienced men", impractical ivory-tower visionaries, theoretical fellows who have never practiced law, or at least not much, and consequently don't know, don't care and can't find out what practicing lawyers do for a living,[3] and, on top of that, don't know how to teach.[4]

Second, it is charged that the trouble is caused by the exclusive use of the case system as the method of law school instruction.[5]

Third, it is argued that the bar examiners are to blame because of their failure to keep the law schools in line.[6]

A Look at the Facts— What Are Law Schools Doing?

First, a word about legal education in general. I feel that those responsible for legal education have, on the whole, been doing a good job. I should be hesitant to say this were it not for the fact that the teaching branch of the legal profession is far from complacent. On the contrary, law teachers have been and still are in the midst of quite an intensive self-searching investigation of both teaching methods and objectives.[7]

That legal education has been good is best demonstrated by the fact that men trained under the case system, with its emphasis on analytical skill and advocacy, have gone into practice and into business, onto the Bench, and into teaching and have done well. Even more important, and sometimes lost sight of, these lawyers, judges and law teachers have been among the leaders in the development of the methods of handling and solving the complex problems of modern society. They have contributed probably more than any other group to the solution of problems in the great new fields of administrative law, labor law, trade regulation and taxation. Their ability to do so has arisen out of their training in sound, tight thinking under the case system. Although the law schools may have been slow to add courses in some or all of these new areas, the fact remains that common-law-trained lawyers from law schools employing the case system not only mastered, but developed, these new fields of law. A system of legal education that can turn out such men is certainly not defective.

This does not mean that the law schools should be satisfied with the job that they did or are doing, for good as it is or was, it might still be better. Many lawyers who recognize the ultimate value of this system of legal education are critical and, at times, even bitter about the difficulty of transition from law school to practice. The charge is made that law school work is impractical, that it is too theoretical. Such an accusation is unsound. All law is theory, whether it be found in a case or a statute or in the wide blue yonder. There seems to be a tendency on the part of some lawyers to refer to the theory that they use every day as practical stuff, while brushing aside the principles employed by a fellow practitioner as pure theory.

The complaint of difficulty of transition from law school to practice is better taken. This accusation stems from the failure of many, probably never all, law schools to teach any of those skills and insights essential to actual practice other than legal analysis and, to a certain degree, advocacy. But even here, I can't help but wonder whether the difficulty doesn't stem more from the beginner's fear of the unknown than from lack of ability and training to cope with the problem at hand. A law student who has learned how to think, who knows how to read and brief a case, who can spot legal issues, who has learned to analyze and synthesize, to reason by analogy, who has mastered a great body of general legal principles, who has learned that rules do not solve cases, who has learned to look behind the rules to find the reason for them, who has talked about, discussed, and thought about the sociological, historical, economic, moral and human factors bearing on legal principles, who knows the importance of facts in our system of jurisprudence, and who has learned to deal with the application of rules to varying fact situations, who is familiar with our judicial machinery, its strengths and its weaknesses, who has at least a speaking acquaintance with the place of legislation in our system, *ought* to be able to, and in most instances is able to, cope with any problem which he is likely to get when he first starts in practice. If he can see the problem, he certainly has the know-how to find the answer to it. Time, and he will need time since he is inexperienced, will be no problem, for if he is on his own, he isn't likely to be overwhelmed with legal business. If he is in a law office, the chances are

3. By what alchemy this startling change comes over those of us who enter full-time law teaching none of our critics makes clear. It's the type of generalization which degenerates into the "You Are!"—"I'm not" type of argument.

4. Would Mr. Cantrall send us all to teacher-training school? What about our part-time law teachers? Many of the younger law school teachers have, in graduate work, been exposed to training in techniques of teaching law. The older lawyers who come into teaching have available quite a bit of literature on the subject. See, for example, the AALS' *Journal of Legal Education*. In particular, in accord with Mr. Cantrall's idea, but not his solution, see Newman, "Lighthouse, Fog and Law: A School For Teachers?", 1 *J. of Leg. Ed.* 582 (1949). See also, Cheatham, "A Seminar in Legal Education", 1 *J. of Leg. Ed.* 439 (1949); Leach, "A Professorship of Legal Education Recommended", 2 *J. of Leg. Ed.* 149 (1949); Stansbury, "On Teaching Law Teachers To Teach", 3 *J. of Leg. Ed.* 429 (1951).

5. For those who would like to know something about the case system, its advantages and disadvantages, see Jones, "Notes on the Teaching of Legal Method", 1 *J. of Leg. Ed.* 13 (1948); Patterson, "The Case Method in American Legal Education: Its Origins and Objectives", 4 *J. of Leg. Ed.* 1 (1951); Green, "Advocacy and Case Study", 4 *J. of Leg. Ed.* 317 (1952); Morgan, "The Case Method", 4 *J. of Leg. Ed.* 379 (1952).

6. Before this criticism is taken seriously, I suggest some homework. Every lawyer interested in legal education and admissions to the Bar should read the A.B.A.'s Survey of the Legal Profession Reports on "Bar Examinations and Requirements For Admission to the Bar", published in 1952, by Shepard's Citations, as well as Harno's *Legal Education in the United States*, published in 1953 by Bancroft-Whitney.

7. Griswold, "Educating Lawyers for A Changing World: A Challenge to Our Law Schools", 37 *A.B.A.J.* 805 (1951). See any issue of the *Journal of Legal Education*. For example, in Volume 1, at page 155, Fuchs, "Legal Education and the Public Interest" (1948); De Capriles, "A Report on The Inter-Professions Conference", at page 176; Fuller, "What the Law Schools Can Contribute to the Making of Lawyers", at page 189; Katz, "Human Nature and Training for Law Practice", at page 205; Llewellyn, "The Current Crisis in Legal Education", at page 211. See also, "Conference on Legal Education and Admission to the Bar", reported in 23 *Rocky Mt. L. Rev.* 1-126 (1950); "Symposium on Developments in Legal Education", 11 *Oh. St. L. Rev.* 1-56 (1950).

that he will have the assistance of other young lawyers or supervision by a superior.

However, I think the law schools can and should, for the good of all concerned, help the youngster over these first rough days. The point is that a great many law schools have been working on this problem, in one way or another, for many years. Some have gone further than others towards a solution. A general charge of incompetency on the part of the law schools is simply not true. It is unfair and is likely to mislead the public.

Mr. Justice Jackson recently stated, "If the weakness of the apprentice system was to produce advocates without scholarship, the weakness of the law school system is to turn out scholars with no skill at advocacy. The problem, therefore, is whether a way may not be found to teach the art of trying an issue of fact, making a trial record, and generally how to handle a lawsuit in trial court."[8]

Clinical Training in Law Schools

Can the law schools solve this problem? Yes. They not only can, but many of them have solved it. There are a number of ways and means available for giving students the clinical training which many lawyers think they ought to have.

A goodly number of law schools now operate a legal aid clinic in which students are given the opportunity to interview clients, investigate facts, talk to witnesses, prepare legal memoranda, pleadings, motions or demurrers, sit in on pretrial procedures and negotiations for settlement, and participate in the trial of cases. Such training is realistic, and most students find it exceedingly stimulating.[9]

Another device that has worked very well in the few schools that employ it is the indigent prisoner program, under which law students are assigned to the attorney who is assigned to the defense of an indigent accused of a crime. This program requires complete co-operation between the Bench, the Bar and the law school. I can assure you that it has worked exceedingly well.[10]

A few law schools operate a practice court, using actual live controversies presided over by local judges. Thus the students get practical experience and training in dealing with real issues, contacting and conferring with real parties and witnesses, preparing and filing actual pleadings, and examining and cross-examining persons with personal knowledge of the actual events which are the subject matter of the trial. "Practice Court serves the function of a legal laboratory where, under expert supervision and in a highly realistic setting, the students are given an opportunity to put into practice the knowledge which they have acquired during the course." With the co-operation and consent of the Bench and the Bar, and under proper admonition against the stirring up of litigation, sufficient cases are found to take care of the Court's needs out of student pranks and campus and university community accidents.[11]

Other law schools have endeavored to get the necessary realism for their Practice Court through the use of good litigious problems taken from current movies,[12] or by actually photographing by motion picture camera a prepared skit which is then shown only to the appropriate witnesses.[13]

Any law school, through any one or a combination of these devices, can give its students at least some acquaintance with the problems of preparing a case for trial, as well as some experience in the actual trial of a case.[14]

Other Types of Skill Training in Law Schools

One of the most important skills in the lawyer's arsenal is an ability to use a law library.[15] Training in this oft-neglected area has now been recognized and is a required course in almost all law schools. Such a course teaches the students what law books are available, their purpose, what is in them and how to use them. The theoretical training is then implemented by problem work which requires the students to apply and use their new-found knowledge. These courses are frequently tied into an appellate moot court where, in addition to training in how to use the law library, the student receives his first training in the art of exhaustive legal research, in the preparation of a legal memorandum, in the preparation of an appellate brief, and in advocacy before an appellate tribunal.[16] Here again, the student receives training in several of the many skills required of the complete lawyer.

Courses primarily designed to give the law students training in legal research and writing are becoming more common.[17] There was a day when such training was limited to law review men. The value was, and

8. 3 *Stan. L. Rev.* 48 (1950), at page 56.

9. Bradway, "Case Presentation' and the Legal Aid Clinic", 1 *J. of Leg. Ed.* 280 (1948); Miller, "Clinical Training of Law Students", 2 *J. of Leg. Ed.* 298 (1950); Robert G. Storey, "Law School Legal Aid Clinics", 3 *J. of Leg. Ed.* 533 (1951); Johnstone, "Law School Legal Aid Clinics", 3 *J. of Leg. Ed.* 535 (1951); Brownell, "Legal Aid in the United States, 1951," prepared for the Survey of the Legal Profession; Bradway, *Basic Legal Aid Clinic Materials* (1950).

10. Webster, "Defense of the Indigent—The Erie Bar Plan", 24 *N. Y. State Bar Bul.* 84 (1952).

11. Green, "Realism in Practice Court", 1 *J. of Leg. Ed.* 421 (1949).

12. Hunter, "Motion Pictures and Practice Court", 1 *J. of Leg. Ed.* 426 (1949).

13. Professor Joiner of the U. of Michigan Law School has used this approach rather successfully.

14. See also, L. P. Wilson, "More About Realism in Practice Court", 1 *J. of Leg. Ed.* 569 (1949); F. M. Wilson, "A Practical Practice Court Course", 3 *J. of Leg. Ed.* 285 (1950); Williams, "School Trains Students for Trial Work", 36 *A.B.A.J.* 513 (1950).

15. Roalfe, "Some Observations on Teaching Legal Bibliography and the Use of Law Books", 1 *J. of Leg. Ed.* 361 (1949); Peairs, "Legal Bibliography: A Dual Problem", 2 *J. of Leg. Ed.* 61 (1949); Moreland, Legal Bibliography: A Factual Problem, 2 *J. of Leg. Ed.* 489 (1950).

16. Mr. Justice Robert H. Jackson, "Advocacy Before the Supreme Court: Suggestions for Effective Case Presentation", 37 *A.B.A.J.* 801 (1951). Professor Edward D. Re, *Brief Writing and Oral Argument*, Oceana Publications (1951). See also, Westwood, "Brief Writing," 21 *A.B.A.J.* 121 (1935); Davis, "The Argument of an Appeal", 26 *A.B.A.J.* 895 (1940); Birkett, "The Art of Advocacy", 34 *A.B.A.J.* 4 (1948); Wiener, *Effective Appellate Advocacy* (Prentice Hall, 1950).

17. Cook, "Teaching Legal Writing Effectively in Separate Courses", 2 *J. of Leg. Ed.* 87 (1949); Shestack, "Legal Research and Writing: The Northwestern University Program", 3 *J. of Leg. Ed.* 126 (1950); Mandelker, "Legal Writing—The Drake Program", 3 *J. of Leg. Ed.* 583 (1951); Horowitz, "Legal Research and Writing at the University of Southern California—A Three Year Program", 4 *J. of Leg. Ed.* 95 (1951).

is, quite evident. The problem of the law schools is primarily one of personnel. Doing a good job in this area takes a lot of time and a lot of patience, and, like all clinical training, it is personal, calls for small classes, and is, consequently, expensive. This has been the big drawback in the program. Your co-operation in helping the law schools obtain the money necessary to do a good job is earnestly solicited!

The seminar and problem courses with which law schools have been experimenting for quite some time meet the criticism of those who complain that the law schools fail to teach their students how to use the principles that they learn so well under the case system. Training in the spotting of legal problems, in legal research, in the preparation of legal memoranda, in outlining the steps which should be taken to accomplish the objective of the specific problem, based upon discussion of the problem with business, banking, insurance, accounting or other experts in the nonlegal area, followed by the drafting of the necessary legal instruments, gives the student a foretaste of the type of thing he will be called upon to do as counsellor and adviser.[18]

Many schools are training their students in the art of legal draftsmanship, either by separate courses or by integrating drafting problems into regular seminar or problem work. A book on legal drafting recently published by Professor Robert N. Cook of Western Reserve University's School of Law has been of great help to the law schools in that it has provided them with badly needed material. I am told that many lawyers have found this book quite handy.[19]

In addition to these "know-how" courses, many law schools are experimenting with courses in law office management,[20] in briefing services for lawyers,[21] with supervised visits to recorders' offices and to trials, hearings and appeals in the various courts and administrative bodies in the community. Student bar associations affiliated with the American Bar Association's American Law Student Association have done, and are doing, an excellent job of bridging the gap by bringing the law students closer to the practicing Bar during their school days. This is an area where the local bar association can be of great help by co-operating as fully as possible with the law school and its student bar association.

The Two Problems—Money and Time

Since the law school teachers are practical enough to see these weak spots in legal education and smart enough to work out a solution, why haven't all law schools immediately adopted all these procedures? There are at least two important reasons why not: the first, money; the second, time. Clinical training is expensive. Many law schools simply cannot afford the above program, or at least any great part of it. If the local bar associations really believe in such training and are willing to help the law schools provide it, a number of the devices above referred to might be made use of to solve the problem in an inexpensive way.

Clinical training also takes time, and our time is short. Most law schools have but three years. A few ask for a quarter more, usually a summer session (but serious financial problems, both of the school and the students, are interfering with this development). A few law schools are on a four-year program. The American Bar Association and the Association of American Law Schools are both inclined to the view that six years of prelegal and legal education is about all that can be demanded. This is a difficult problem. Dean Harno deals with it at some length in *Legal Education in the United States.* Its solution will require careful consideration of the education of the lawyer in its entirety, from high school to retirement.

I have been discussing the pressure for skill-training from one group of lawyers. This is not the only pressure on the law schools. Another group of lawyers tells us that we are failing in our training of future lawyers because we don't teach international law, comparative law and local government law, because of our neglect of public law in favor of private law. This, while the private law teachers sadly watch the public law men take over the curriculum! This, while many bar examiners continue to list or cover on their bar examinations more subjects than a law school can possibly teach in a three-year period,[22] because we are cutting criminal law and procedure to the marrow (the bone has long since been worn away!), because we have neglected the general field of judicial procedure and the administration of justice, because we have neglected to ground our students in legal ethics and the professional responsibility of the lawyer, and finally because we have completely neglected the training of our students in legislative processes and methods.[23] Yet, some law schools are doing a good job in each of these areas. Again, we can demonstrate somewhere, in some law school, the ability to do the job and do it well. But we can't do everything that every lawyer wants us to do all the

(Continued on page 260)

18. Harsch, "Law School Course in Practical Estate Planning", 90 *Trusts and Estates—the Fiduciary Journal* 292 (1951).

19. Armstrong, Book Review, Cook, *Legal Drafting*, 38 A.B.A.J. 57 (1952).

20. Reginald Heber Smith, "Law Office Organization", reprint of articles in A.B.A.J. (1943); Price, Personal and Business Conduct in the Practice of Law (Law Office Management) A.L.I. (1952).

21. Fahey, "A Law School Briefing Service", 25 A.B.A.J. 502 (1939); Dobie, "An Approach to 'Clinical' Legal Education: The University of Louisville Briefing Service", 3 *J. of Leg. Ed.* 121 (1950).

22. Stevens, "A Factual Survey of Bar Examination Subjects", 34 A.B.A.J. 95 (1948).

23. Vanderbilt, "The Responsibilities of Our Law Schools to the Public and the Profession", 2 *J. of Leg. Ed.* 207 (1950); "Symposium on Education for Professional Responsibility", 1 *J. of Leg. Ed.* 175-220 (1948); Mathews, "Legal Education and Responsible Leadership", 4 *J. of Leg. Ed.* 249 (1952); Redden, "Are We Vulnerable?" 1 *J. of Leg. Ed.* 578 (1949); Jones, "A Case Study in Neglected Opportunity: Law School and the Legislative Development of the Law", 2 *J. of Leg. Ed.* 137 (1949); Crotty, "Character and the Law Schools: Professional Conduct Should be Emphasized", 39 A.B.A.J. 385 (1953); Stevens, "Professional Responsibility—The Role of the Law School and the Bar", 6 *J. of Leg. Ed.* 203 (1953); Vanderbilt, "The Five Functions of the Lawyer: Service to Clients and the Public", 40 A.B.A.J. 31 (1954).

Piscatoribus Sacrum:

or, The Compleat Man of Law

by **Henry F. Tenney** • of the Illinois Bar (Chicago)

■ Henry Tenney's steady rise to the top in his chosen profession was in no wise retarded by his indulgence in his favorite avocation of angling. In this too he is a past master who knows whereof he speaks. So it was with his father, the late Horace Tenney, leader of the Bar, member of the editorial board of the *Journal*, devotee of the gentle art of angling and a great hunter.

Not all lawyers are anglers; not all anglers are lawyers; but the number of those who are both is substantial; and none wastes his time who whips the crystal clear waters of a bubbling brook or lays his cast gently upon the calm surface of some little forest-bordered lake at sundown, or presents his lure in any number of different ways sanctioned by the best traditions of angling and depending upon the character of his prey.

Izaak Walton quotes Sir Henry Wotton as saying of the art of angling, of which he was an ardent practitioner, "'Twas an employment for his idle time, which was then not idly spent, a rest to his mind, a cheerer of his spirits, a diverter of sadness, a calmer of unquiet thoughts, a moderator of passions, a procurer of contentedness"; and "that it begat habits of peace and patience in those that professed and practiced it".

It is well then for us to remind those of our readers who would angle again this spring that even as they gather close about a roaring wood fire and spin yarns of great achievements in the past, while the chill March winds whistle, it behooves them to take inventory and look well to the integrity and adequacy of their tackle against the days to come.

Herein the subject is presented with authority in the pleasing and inimitable style of the author.

■ Spring comes to different people in many different ways.

To the Meteorologist, it is the date on the calendar officially recording the fact that somehow the earth has managed once again to travel from the winter solstice to the vernal equinox. Few ordinary folk, however, note the passing of that natural milestone in the world's annual gyrations.

To most others there are more exciting, more significant signals which mark this change—a change not only in the physical world, but also in man's mental state. "In a pleasant spring morning", says Thoreau, "all men's sins are forgiven." Breathes there a man with soul so dead who does not have some special event which for him, at least, slams the door on winter and opens it on spring.

To the Farmer, it's the sap dripping into the buckets of his sugar bush, sheep dropping their new offspring in the greening field, old hens beginning to act broody, willow twigs turning yellow, winter wheat thrusting up through the vanishing snow, the audible throb of the earth preparing once again to fill his barn, his silo and his corn crib.

To the Trapper in his lonely cabin on the shores of the Great Slave Lake, it is the softening snow balling up on his snowshoes, patches of brown appearing through the snow of the forest floor, lengthening days, icicles disappearing from the eaves of his cabin, the black bear, scrawny after the winter's hibernation, playing with her two new cubs at the edge of his clearing.

To the Sojourner in Manhattan, it is the overdressed crowds milling about St. Patrick's Cathedral on Easter morning, chocolate rabbits in in the saloons, Red Cross flags flying the candy store windows, bock beer on Fifth Avenue.

To the Commuter and his wife, it is raking the covering off the flower beds, excitedly poring over seed catalogues, painting the porch furniture, putting up screens, changing the paper on the kitchen shelves, mud tracked into the house by dogs and children, putting away snowsuits and wondering if last year's clothes of the six-year-old can be passed down the line without too serious revolt from the juniors.

To the Bright-Eyed Bird Watcher, it is the return of the purple martins to their accustomed houses, robins stamping across the lawn on their eternal search for worms, warblers pausing briefly in their incredible flight from South America, geese honking as they wedge northward across the early-morning sky, the punctual return of the swallows to the Capistrano Mission on St. Joseph's Day, and the whole mysterious migration of countless millions of birds to their summer nesting grounds.

To the Sailor, in his winter boatyard it is scraping, painting, caulking, restepping the mast, varnishing the spars, stretching the sails, polishing the bright work, replacing worn halyards, checking the compass, planning a summer cruise, the Coast Guard Cutter, Hollyhock, setting out the navigation buoys.

These signs of spring are all right in their way, but

To the Fisherman, none holds his interest as does the arrival of the spring fishing-tackle catalogues! This event, like nothing else, starts his jaded thoughts wandering down pleasant streams and exploring again the well-remembered camp sites. Fishing, like nothing else, releases taut nerves, relaxes the mind. One fine fisherman puts it thus:

> No sooner does he feel the cool pressure of the ripples against his waders than all customary thoughts slip from him, floating away down the stream before his first cast goes up. Senses and instincts long disguised, come into play. Odors, sounds, lights and shadows and motions, muscular strains, changes of temperature, flood all at once in upon him stirring his oldest memories, blurring his latest cares. He seems to stand outside himself and he looks back upon the man, who was yesterday called by his name, with fading comprehension and growing commiseration.

Yes, it's Hardy, Orvis, Abercrombie, Gokey, Bean, Peck, Von Lengerke, Herter and Payne—names to conjure with; their literature no fisherman would trade for all the great books of the western world.

Really, it is surprising how eagerly we turn over the pages looking for the old friends, wondering what new lures have been invented to attract the eager fisherman. If a C.P.A. were to examine a fisherman's books, he would recoil with horror when he made a physical check of his inventory. Judged by accounting standards, most of it would be written off as valueless and further additions strictly forbidden.

When a fisherman ceases buying tackle he does not need, tackle he cannot afford, tackle he cannot use, he should consult his physician as he has definitely passed his prime. One of the basic privileges of the sport is that of squandering money on surplus equipment. Every angler worth his salt will resist to the death any attempt to deprive him of that inalienable right. After all, who can resist the appeal of the articles listed in those catalogues?

Here are just a few samples:

Fly rods of bamboo, lance wood, greenheart, steel, glass—of all weights, all lengths for all kinds of fishing in all kinds of water; grilse, salmon, trout, bass, steelhead, bonefish, salt water fishing of all descriptions.

Flies—wet and dry, large and small, for low water, for high water, for fresh water, for salt water.

Leaders—tapered, level, gut, nylon, mist color, green or camouflaged.

Lines—level, single tapered, double tapered, torpedo, floating, sinking.

Fly boxes—magnetic and magnifying.

Creels—reels, nets, rod cases, and, believe it or not, canned worm food.

Yes, all the old ones are there and many more besides. For years we have mulled over these pages saying firmly, "there is nothing we need", "nothing we can use" and yet, year after year, we continue to buy and after all, can you blame us for insisting on owning a lure described thus:

> Big prominent eyes, combination hair and yellow mottled legs. A fuss raiser that game fish can't resist going for.

If that one doesn't excite you, what about this?

> Designed especially for catching big fish.
>
> Drop one on the water, give it a few jerks, and the popping noise will bring the big bass up with open mouths.

If the bass won't open his mouth, the ever-gullible fisherman will.

But if you are absolutely determined to bring home the meat, perhaps you should lay in a supply of

> Floating trout midgets which have made the greatest catches of brook, brown, cutthroat and rainbow of any artificial flies designed.

Or, of the feathery minnow which has

> Extremely lively action and tremendous luring qualities due to its scientifically shaped head.

What is "a scientifically shaped head"? I am sure I don't know. Buy one and find out by comparison if your own head is scientifically shaped to bring out its best luring qualities. I'll bet it isn't!

Here is another one you must positively add to your collection:

> They are the boys' standby and bring creels of fish for the old timer when nothing else will.

No fisherman with any real stuff in his make-up can help adding these specimens to his already overstocked supply.

The Names of Flies Recall the Past

Now, it is curious how reading the names of certain flies recalls past adventures with them. Take salmon flies. I can read the names *Amherst, Black Dose, Durham Ranger, Jock Scot, Night Hawk* and others without any particular reaction. But when I read *Green Highlander,* immediately it's a sparkling morning early in June over Judge's Pool on the Restigouche, a couple of bends above the mouth of the Upsalquitch where Camp Harmony stands. My Highlander is drifting peacefully with the current. Suddenly a great splash, a really heavy fish takes hold. Hands off the reel as the fish makes a savage run to the head of the pool, stripping the line down to the backing. Will the splice hold? Fifteen minutes of nerve-racking, prayerful playing

with hope and anticipation running high! Then my heart skips a couple of beats, my stomach turns over, the line slackens, the rod straightens—my leader has parted just above the fly! And that is why I will never forget the Green Highlander.

Or the Grizzly King. It's late afternoon at Hamilton Pool on the Nipigon. Charlie, the Indian guide, has lowered the canoe halfway down the rapids with a rope. Ten minutes of fruitless casting, a splash, a flash, the good old Payne bends double—the battle is on. It takes about 2,000 heartbeats to play this one out and for good reason. He weighed just under four and a half pounds!

When I read the names *Royal Coachman, Silver Doctor, Wickham's Fancy,* I do not remember a particular fish netted or lost, but three rivers which run north into Hudson Bay—the Eskiginiga, the Little Current and the Squaw; rivers where these flies are sure-fire; rivers seldom disturbed by the stroke of a paddle or the click of a shod canoe pole; rivers in whose cold waters trout spawn, grow and die without ever seeing an artificial fly.

Let's turn over to the bass department. Here is one we call the *Green Dragon,* invented by our old friend, Roy. It's early July on the Net River, a fine fast-moving stream where small-mouthed bass thrive. Armed with Green Dragons, Tom, Pritch and I flounder down the half-mile shoot of the Snake Rapids casting in the pools as we go. When we reached the bottom, each had landed and returned to the water, a limit of fighting small-mouth from a half to one and a half pounds; sleeping that night at the White Pine Camp, eating, not fish, but something better—canned whole chicken mixed with canned chicken soup; listening to coyotes howling and to Jack's stories of wolf trapping.

Another on the bass pages is an all-yellow job, the commercial name for which I do not know. We call it the *Nelson Killer,* after Irner Nelson with whom we have whipped over many miles of the St. Croix and who is as fine a fly fisherman as I have ever wet a line with.

The Invention of a Fly

The *A. S. Trude.* It is nearly fifty years ago. My father and I camped on the glacier-polished rocks of Granite Point on the south shore of Lake Superior, half-way between the Huron Mountain Club and Marquette. Our companions were the late Carter H. Harrison (then Mayor of Chicago), his son, Carter, Willie (as we called him) Hamilton, of Detroit and his son, David.

Mr. Harrison's long-time guide, Jack Cassidy, was with us. He went along on all our fishing trips. This was shortly after Mr. Harrison had invented the A. S. Trude. It was not as well known then as it is today, but proved to be the best killer by far in our books. Whenever I see a Trude, I think of that trip with our fathers—all fine fishermen; of the storm which forced us to take refuge in the mouth of the Yellow Dog River.

On the wall of my office hangs a framed specimen of the A. S. Trude, under which there appears the following:

Huron Mountain
September 1952

Dear Henry:

Taking age and arthritic knuckles into consideration this A. S. Trude looks pretty good. It was tied last September.

Good luck.
CARTER H. HARRISON

At the time Mr. Harrison tied that fly, he was a young man of 92.

When I was about 10 years old, he infected me and many others of my generation with an incurable desire to fish for brook trout with a fly rod.

Just to prove that tying a killing fly does not require feathers from an Indian jungle cock, an African bustard bird or a South American macaw, here is Mr. Harrison's account of how he made the first Trude:

During our 4-day stay at Mr. Trude's Ranch in Idaho, there was a constant

HENRY F. TENNEY

jocular dispute between Graham H. Harris, an angler of sorts who not only tied his trout and salmon flies, but made bamboo rods of the first quality, and myself and Mr. Trude, as to the proper size of flies to be used on the Snake River, a stream of water so clear that looking ahead when wading, one could not tell whether it was 18" or 4' deep! Mr. Trude felt that a #10 or #8 fly was in order on it—we clung to salmon flies on #4 hooks.

For years I had tied my own flies. In my outfit was a large hook which, from time to time when fishing for muskellunge, I had lashed to wood to make a gaff. The night before breaking camp, we were in the ranch library, reading and gossiping, when Mr. Trude left the room. A queer notion came into my head. I got out the big hook. A red spaniel was lying on the rug. I clipped a bunch of hair from his flank. The rug was roughly woven, with a lot of red worsted in it. I clipped enough to tie a body on the hook. On impulse, I tied the dog-hair as a wing and fashioned over it, a sort of hackle of red squirrel-hair. When Mr. Trude returned, I got up on the table and, in a flapdoodle speech, thanked him for his invariable kindness during the days we had spent on his place, ending with the statement that, to show our appreciation, I had tied a small fly for his use in future fishing and further to honour him, I had named the fly the "A. S. TRUDE"!

Looking it over, the thing looked so darn good that I got out regular fly-tying material and tied 2 flies on #4 hooks—one with a red yarn body wrapped with silver tinsel, using squirrel tail hair for the wing and a red rooster hackle tied over it; the other

unchanged except for green yarn supplanting the red.

The next day no trout would take anything except the A. S. Trude, which turned out to be really a great killer.

"That evening at the ranch [said Mr. Harrison], we emptied two creels, large ones too; and the side and back pockets of our hunting coats were all filled to overflowing."

And so another great fly was born.

We could go on indefinitely recalling angling excursions; bonefishing off Key Islamorode with Pete, Harve and Phil; encountering a large school of dolphin in a choppy sea off the shore of Robinson Crusoe's Island; dipping smelt by the light of bonfires strung along the banks of the Escanaba River; catching cutthroats below the old dam on Jackson's Lake; rowing the Three Pines before daylight; hiking up the river trail to the Lower Falls; a stormy day at the Salmon Trout Dock with Em Tut, talented artist, charter member of the Halo Club and the best fisherman of all my contemporaries. All these recollections and many more besides, emerge out of the pages of the spring catalogues.

So please keep me on the mailing list, Messrs. HARDY, ORVIS, ABERCROMBIE, GOKEY, BEAN, PECK, VON LENGERKE, HERTER and PAYNE. It is the arrival of your annual message which really marks the coming of spring!

But in the end, after all the fancy equipment is examined and all the catalogues are read, the fact remains that if you were ordained to be a fisherman, all you really need is

A reasonably good rod.

Thirty yards of level enameled line.

A single lightweight dark-colored reel.

A spool of nylon for leaders.

An old felt hat.

And ten flies—or, if you think ten is too many, then give heed to the advice of the Master when he said "Three or four flies, neat and rightly made and not too big save for a trout in most rivers all the summer."

If you can't catch fish with that outfit, perhaps you can garner "those rewards of which the angler is always sure, which will rise to the fly in every pool and with which the magic of memory can always fill the emptiest of creels".

Or, if perchance you are a man of law, as well as a fisherman, you can if you choose, reflect on the unique legal status of the wild fish in the streams, the beasts in the forests and the birds in the air. As these creatures go about their daily struggle for survival, I doubt if they worry much about the unusual legal niche which man has invented for them. While my legal research on this subject has not been exhaustive, yet, as I understand it, the law says they belong to every man and yet to no man in particular.

Somewhere I read that in the beginning, the whole of the human family had a quasi property in all of the so-called lower animals of the earth, but that in these modern times, the state claims ownership on behalf of all the people. This doctrine, I maintain, violates one of the fundamental tenets of our democratic faith, namely, that all government derives its just powers from the consent of the governed. I challenge you to demonstrate that any member of this roving wild-life family has ever consented, or indeed, is even conscious of the fact that man claims dominion over him by virtue of some assumed law of nature.

Since we have become involved in some of the legal aspects of fishing, let us note another legal quirk. For man to establish the legality of his claimed ownership, no government patent, no bill of sale, no deed, no sealed instrument, no compliance with the Statute of Frauds is required. All that is required says Blackstone, is the "exercise of sufficient art, force and skill to keep them in subjection".

So he who would fill his creel must first forget all his hard-won knowledge of the art of conveyancing. He must, instead, devote himself to the "exercise" of those "arts" and those "skills" which will enable him to keep his catch in "subjection".

Therefore, as your intended prey leaps at the end of your leader, do not be under the misapprehension that the line which connects the two of you constitutes your chain of title. At this point, your title is *conditional* only, to be lost *entirely* unless you land and kill your quarry —at least, so said the Supreme Court of Maine many years ago. Therefore, keep a proper spring in your rod if you hope to perfect your claim of legal ownership.

But perhaps we should not quarrel too much with the state's asserted ownership as long as it is asserted on behalf of all of us. For it was not so in ancient times. Then the royal monarch claimed the sole right to hunt and relax in the forests. Ordinary folk, save perhaps Robin Hood, dared not set foot therein. John Manwood, in his *Treatise of the Lawes of the Forest* (1615), quaintly states the doctrine thus:

> For a Forest both is and hath been always accounted a franchise of such noble and princely pleasure, that it is not incident unto any subject of this realme to have the same, but only unto the Crown and royal dignitary of a Prince.

So, after all, the "good old days" were not so good for us ordinary mortals.

Now fishermen have been accused, and I think rightly, of being simple-minded folk. This indictment never has bothered me—apparently neither did it the Master who once spoke to the Scholar in this manner:

> If you mean such simple men as lived in those times when there were fewer lawyers, when men might have had a lordship safely conveyed to them in a piece of parchment no bigger than your hand, though several sheets will not do it safely in this wiser age: I say, sir, if you take us anglers to be such simple men as I have spoken of them, myself and those of my profession will be glad to be so understood, for when the lawyer is swallowed up with business, we possess ourselves in as much quietness as the silent silver streams which we now see glide so swiftly by us.

I maintain above all else that

you should have an appetite for the sport—a gourmet's, not a glutton's appetite—one that is satisfied by something less than a limit of fish; in fact, one that thrives on the planning, the anticipation and all the other intangibles that are a part of every "Operation Fontinalis".

When you return home from the stream, take your imagination out of the deep freeze—cast yourself back 300 years along the road which time has traveled, to a fine, pleasant May Day morning in Merrie England. Stretch your legs up Tottenham Hill and overtake Piscator, Venator and Auceps. Walk with them to the thatched house in Hadsden for your morning draft. Listen respectfully as Piscator instructs you and the countless thousands of anglers who have followed in his trail:

> But he that hopes to be a good angler must not only bring an enquiring, searching observing wit; but he must bring a large measure of hope and patience, and a love and propensity to the art itself; but having once got and practiced it, then doubt not but angling will prove to be so pleasant that it will prove to be like virtue, a reward to itself.

Conference in Honor of the Bicentennial of Columbia University

▪ Scholars from many countries participated in a conference in honor of the Bicentennial of Columbia University held on January 15 and 16 at the House of The Association of the Bar of the City of New York. The speakers considered both the experience of great religious communities and of selected nation-states in striking a balance between protection of the security of the community and keeping open the channels of communication between men.

Sir Hartley Shawcross, the former Attorney General of the United Kingdom, who was a prosecutor at Nuremburg and is now Chairman of the Council of the Bar in England, presented the general attitude in Great Britain. Sir Hartley noted that in the face of the Communist conspiracy, "we have refused to allow ourselves to be stampeded by fear", that all parties agree that repressive measures would make "the dangers to our way of life the greater" and that, "on the whole, the community accepts the fact that if we claim freedom to propagate the ideas with which we agree, we must grant others freedom to propagate ideas which we detest".

"Broadly we say", he said, "that indirect propaganda can best be dealt with by an informed and enlightened public opinion; espionage and sabotage only by government agencies—and by no others—in accordance with the rule of law."

Whitney North Seymour, Chairman of the American Bar Association's Committee on Individual Rights as Affected by National Security, in discussing the American experience stated that some "private groups" have been using security as a means of bringing pressure "against things they don't like". Mr. Seymour drew a distinction between repressing the spread of ideas and protecting the community against a conspiracy. "It has become a truism that dissent and treason must not be confused. Our tradition of the freest statement of, and access to ideas must survive the present period."

The experience of the great religious communities was discussed by a panel consisting of Dr. Robert Gordis of the Jewish Theological Seminary of America; the Very Reverend Dr. F. J. Connell, C.SS.R., Dean of the Faculty of Theology of Catholic University of America; Dr. Saba Habachy of Egypt; and Professor Robert T. Handy of Union Theological Seminary.

The nation-states' experience was considered by Sir Hartley Shawcross; Mr. Justice Ivan C. Rand of the Supreme Court of Canada; Dr. Hu Shih, President in Exile of the Peking University and former Chinese Ambassador to the United States; Professor Isidore Kisch of the University of Amsterdam; and Professor Angelo Piero Sereni of the University of Ferrara, Italy. The experience of the U.S.S.R. and of Spain was discussed by Professor Harold J. Berman, author of *Justice in Russia* and Professor of Law at Harvard University; and by Professor Jesus de Galindez, permanent observer to the United Nations for the autonomous Basque Government in exile.

The panel of experts to evaluate the experience included Clifford P. Case, President of the Fund for the Republic, Inc.; Whitney North Seymour; Rex Stout, President of the Authors' League of America; Dr. Arthur Goodhart, Master of University College, Oxford; Dr. Boris Mirkine-Guetzevitch, Dean of the Faculty of Law of the French University of New York; and Professor Kisch.

Dean William C. Warren of the Columbia University Law School opened the conference, and Bethuel M. Webster, President of The Association of the Bar of the City of New York, presided. The *Columbia Law Review* will publish the papers in a special bicentennial issue.

The conference was jointly sponsored by The Association of the Bar of the City of New York, the American Foreign Law Association, The Fund for the Republic, Inc., and Columbia University.

AMERICAN BAR ASSOCIATION

Journal

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EDITORIAL OFFICES

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Signed Articles

As one object of the *American Bar Association Journal* is to afford a forum for the free expression of members of the Bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of the *Journal* assume no responsibility for the opinions or facts in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

■Congressional Investigating Committees

The vast audience which reads the daily newspapers, listens to the radio and watches TV has at least some familiarity with congressional investigating committees and their operations. Congressional investigating committees have become a part of the great American scene and their work has been of sufficient importance to attract the attention of the American Bar Association and furnish the subject for the 1954 Ross Essay. As with any activity dealing with American public life or with national affairs, there is always involved therein some degree of partisan politics as well as the political fortunes and future of the individual members of the various investigating committees. Their work is quite often reviewed and the results criticized not entirely on their merits. However, no one familiar with our Constitution or constitutional law could successfully challenge the authority of Congress to create such committees, and the power of the committees so created to conduct investigations, hold hearings and examine witnesses on matters affecting the national security, welfare and economy. Conceding this, there is still much which can rightfully be said and written on the subject of the procedure which should properly be followed by any such investigating committee. Professor Frank E. Horack, Jr., of Indiana University, who has made a study of this subject and has some definite ideas to express thereon, has written an article which appears in this issue of the JOURNAL (page 191). We commend this article to the attention of our readers. Its author has endeavored to suggest a method of procedure which, if adopted by Congress, would tend to free congressional investigating committees from the embarrassment created by recalcitrant witnesses and yet make the committees subject at all times to direct congressional supervision. He suggests as a method of accomplishing this object a proposal for legislative rather than judicial review of the jurisdiction and procedure of such committees.

■The Bricker Amendment

Following its policy of simultaneously presenting, as it did in September, 1952, and September, 1953, pro and con articles on the treaty power, with special reference to the Bricker Amendment, the JOURNAL in this number publishes one article by Professor Brunson MacChesney opposing any amendment to the Constitution in the treaty area, and another article by Vermont Hatch advocating such an amendment. The current views of Mr. John Foster Dulles on this controversial subject were separately presented in the issue of last December. The two discussions published herewith constitute a valuable contribution to the record of the debate.

Both of these articles were written prior to the commencement of the debate in the United States Senate but will still have a bearing upon the subsequent public discussion and on the consideration of the Bricker Amendment in the House of Representatives, which has not yet addressed itself to the question.

Hotel Arrangements for the 1954 Annual Meeting

Detailed announcement concerning hotel arrangements for the Annual Meeting of the Association, which will be held in Chicago, August 15-20, 1954, appears at page 54 of the January issue of the JOURNAL.

Seventy-Seventh Annual Meeting and Dedication of American Bar Center

First Announcement of Program
Chicago Illinois, August 16—20, 1954

▪ One of the highlights of the 77th Annual Meeting of the American Bar Association will be the formal dedication of the American Bar Center, the new headquarters and legal research buildings of the Association, now under construction.

President's Reception A General Reception will be held in honor of President and Mrs. Jameson (time and place to be announced). Members of the American Bar Association and other related organizations will be guests of the Chicago Bar Association and the Illinois State Bar Association.

The Assembly The opening session will be held Monday, August 16, at 10:00 A.M., and the second session on Wednesday, August 18, at 2:00 P.M., in the Grand Ballroom of the *Conrad Hilton Hotel*. The dedication program will be held in lieu of the third Assembly session on Thursday, August 19, at the building site. The Annual Dinner (fourth Assembly session) is scheduled to be held Thursday, August 19, at 7:30 P.M., in the Grand Ballroom of the *Conrad Hilton Hotel*. The fifth Assembly session will be held immediately following adjournment of the final session of the House of Delegates, in the Gold Room of the *Congress Hotel*.

House of Delegates The House of Delegates will meet in the Gold Room of the *Congress Hotel* at 2:00 P.M., Monday, August 16; 9:30 A.M., Tuesday, August 17; 9:30 A.M., Wednesday, August 18; 9:30 A.M., Thursday, August 19; 9:30 A.M., Friday, August 20.

SECTION MEETINGS AT CHICAGO

Administrative Law (Sunday, Monday and Tuesday, August 15, 16 and 17)

The Blackstone The Council will meet all day Sunday, and the general sessions of the Section will be held Monday afternoon and Tuesday morning and afternoon. A breakfast or luncheon will be held on Tuesday.

Antitrust Law (Tuesday, Wednesday and Thursday, August 17, 18 and 19)

The Blackstone The Council will meet at 2:00 P.M., Tuesday, and the general sessions of the Section will be held Wednesday morning and Thursday morning. A dinner is scheduled for Wednesday evening and a luncheon for Thursday noon.

Bar Activities (Sunday, Tuesday and Wednesday, August 15, 17 and 18)

Conrad Hilton Hotel The Council will meet at 9:00 A.M. and the Committee on Award of Merit at 10:00 A.M., Sunday. Regular sessions of the Section have been scheduled for 10:00 A.M., Tuesday, and 10:00 A.M., Wednesday. (The above schedule is subject to change).

Corporation, Banking and Business Law (Sunday, Monday and Tuesday, August 15, 16 and 17)

The Council will meet at 10:00 A.M. and 2:00 P.M. on Sunday, and the general sessions of the Section will be held at 2:30 P.M. on Monday, and 10:00 A.M. and 2:00 P.M. on Tuesday, at the *Palmer House*. The Division of Food, Drug and Cosmetic Law will meet Tuesday morning and afternoon at the *Northwestern University School of Law*.

Criminal Law (Monday, Tuesday and Wednesday, August 16, 17 and 18)

The Blackstone Regular sessions of the Section will be held on Monday afternoon, Tuesday morning and afternoon and Wednesday morning.

Insurance Law (Sunday, Monday, Tuesday and Wednesday, August 15, 16, 17 and 18)

Palmer House The Officers, Members of Council and Committee Chairmen will meet at a luncheon at 12:00 M., Sunday. Various Committee breakfast meetings have been scheduled for Monday and Tuesday at 8:00 A.M. each day. A luncheon will be held at 12:00 M., Monday, followed by a regular session of the Section at 1:30 P.M. Regular sessions of the Section will be held at 9:30 A.M. and 1:30 P.M. on Tuesday. A reception and dinner dance have been scheduled for Tuesday evening. A regular session of the Section will be held Wednesday morning at 9:30.

International and Comparative Law (Sunday and Tuesday, August 15 and 17)

Conrad Hilton Hotel The Council will meet at 10:00 A.M. and 2:00 P.M. on Sunday. A breakfast meeting will be held Tuesday morning at 8:00 for the

Comparative Law Division. Regular sessions of the Section will be held at 10:00 A.M. and 2:00 P.M. Tuesday. A joint luncheon with the Junior Bar Conference is scheduled for Tuesday at 12:30 P.M.

Judicial Administration (Sunday, Monday, Tuesday, Wednesday and Thursday, August 15, 16, 17, 18 and 19)

The Council will meet at 10:00 A.M. Sunday at the *Conrad Hilton Hotel*. At 12:30 P.M. on Monday there will be a luncheon for Federal Judges followed by an afternoon program at *The Blackstone*. The Annual Dinner in honor of the Judiciary of the United States will be held at 7:30 P.M. Monday, at the *Conrad Hilton Hotel*. Regular sessions of the Section will be held at 10:00 A.M. and 2:00 P.M. on Tuesday, 10:00 A.M. Wednesday and 10:00 A.M. Thursday at the *Conrad Hilton Hotel*. A luncheon for State Judges has been scheduled at 12:30 P.M. Tuesday, at *The Blackstone*. One of the regular sessions will be held jointly with the Special Committee on Traffic Court Program.

Junior Bar Conference (Friday, Saturday, Sunday and Monday, August 13, 14, 15 and 16)

A reception for the Officers of the Conference sponsored by the Directors of the Conference will be held Friday evening. Combined general sessions and Council meetings will be held at 9:30 A.M. and 2:00 P.M. on Saturday and Sunday at the *LaSalle Hotel*. A reception sponsored by the Younger Members of the Chicago Bar Association and the Junior Bar Section of the Illinois State Bar Association will be held Saturday evening at the *Chicago Bar Association* headquarters (time to be announced). A luncheon has been scheduled for Sunday noon at the *LaSalle Hotel*. A debate and reception sponsored by the Conference on Personal Finance Law will be held Monday, at 4:00 P.M. (place to be announced). Arrangements are being made for a dinner dance on Monday evening. A joint luncheon with the Section of International and Comparative Law will be held Tuesday at 12:30 P.M. in the *Conrad Hilton Hotel*.

Labor Relations Law (Sunday and Tuesday, August 15 and 17)

LaSalle Hotel The Council will meet at 10:00 A.M. and 2:00 P.M. on Sunday. Regular sessions of the Section will be held at 10:00 A.M. and 2:00 P.M. on Tuesday. A luncheon has been scheduled for Tuesday noon and arrangements are being made for a reception immediately following the afternoon session.

Legal Education and Admissions to the Bar and joint sessions with

National Conference of Bar Examiners (Saturday, Sunday, Monday and Tuesday, August 14, 15, 16 and 17)

Conrad Hilton Hotel The Section Council will meet at 2:00 P.M. on Saturday, and 10:00 A.M. and 2:00 P.M. on Sunday. The Section will hold joint meetings with the National Conference of Bar Examiners at 2:00 P.M. on Monday, and 10:00 A.M. on Tuesday. A joint luncheon has been scheduled for 12:30 P.M. on Tuesday. The Annual Meeting of the Section will be held at 2:00 P.M. on Tuesday.

Mineral Law (Monday, Tuesday and Wednesday, August 16, 17 and 18)

Conrad Hilton Hotel The Council and Committee Chairmen will meet at 4:00 P.M. on Monday. The regular sessions of the Section wil be held at 10:00 A.M. and 2:00 P.M. Tuesday, and 10:00 A.M. Wednesday. A dinner has been scheduled for Wednesday evening.

Municipal Law (Sunday, Monday, Tuesday and Wednesday, August 15, 16, 17 and 18)

The Blackstone The Council will meet at 7:00 P.M. Sunday. The regular sessions of the Section will be held at 2:00 P.M. Sunday, 2:00 P.M. Monday, and 9:30 A.M. and 2:00 P.M. Tuesday. A luncheon has been scheduled for 12:30 P.M. Monday, and a breakfast meeting of the Council for 8:00 A.M. Wednesday.

Patent, Trade-Mark and Copyright Law (Friday, Saturday, Sunday, Monday, Tuesday and Wednesday, August 13, 14, 15, 16, 17 and 18)

The Sheraton Hotel The Council and Committee Chairmen will meet at 2:00 P.M. and 8:00 P.M. on Friday. A symposium on Patents will be held at 10:00 A.M. and on Copyrights at 2:00 P.M. Saturday. The American Group of the International Association for the Protection of Industrial Property will meet at 10:00 A.M. on Sunday. A symposium on Trade-Marks has been scheduled for 2:00 P.M. on Sunday. The National Council of Patent Associations will hold a breakfast at 8:00 A.M. Monday, and the United States Trade-Mark Association has scheduled a luncheon at 12:30 P.M. Monday. The regular sessions of the Section will be held at 2:00 P.M. Monday, 9:30 A.M. and 2:00 P.M. Tuesday, and 9:30 A.M. Wednesday. A luncheon for the American Group of the International Association for the Protection of Industrial Property has been scheduled for 12:30 P.M. Tuesday. A reception and dinner for the Section will be held Tuesday evening. The new Council and Committee Chairmen will meet at 2:00 P.M. Wednesday.

Public Utility Law (Sunday, Monday, Tuesday and Wednesday, August 15, 16, 17 and 18)

The Blackstone The Council will meet at 2:00 P.M. on Sunday. Regular sessions of the Section will be held at 2:00 P.M. Monday, and at 10:00 A.M. and 2:00 P.M. Tuesday. There will be a luncheon meeting for Council Members and Guest Speakers at 12:30 P.M. Tuesday. The Council will meet again at 4:30 P.M. Tuesday. A dinner dance has been scheduled for Wednesday evening.

Real Property, Probate and Trust Law (Monday, Tuesday and Wednesday, August 16, 17 and 18)

Congress Hotel A luncheon meeting for Council members will be held at 11:00 A.M. Monday. The Division meetings of the Section will be held at 2:00

P.M. Monday, 9:30 A.M. and 2:00 P.M. Tuesday, and 9:30 A.M. Wednesday. There will be a breakfast meeting for the Officers, Council members and members of Section Committees at 8:00 A.M. Tuesday. Arrangements are being made for a dinner Tuesday evening (time and place to be announced). The Council will meet again at 2:00 P.M. Wednesday.

Taxation (Thursday, Friday, Saturday, Sunday, Monday, Tuesday and Wednesday, August 12, 13, 14, 15, 16, 17 and 18)

Congress Hotel The Officers and Council will meet in executive session at 9:30 A.M. and 2:00 P.M. Thursday, with a luncheon at 12:30 P.M. On Friday at 9:30 A.M. and 2:00 P.M. there will be a meeting of the Council and Committee Chairmen, with a luncheon at 12:30 P.M. Regular sessions will be held at 10:00 A.M. and 2:00 P.M. Saturday, and 10:00 A.M. and 2:00 P.M. Sunday. The Section luncheons are scheduled for Saturday and Sunday at 1:00 P.M. Regular sessions of the Section will be held at 2:00 P.M. Monday, and 10:00 A.M. and 2:00 P.M. Tuesday. Arrangements are being made for a reception and dinner dance Monday evening. The special session on State and Local Tax Problems will be held at 9:30 A.M. Wednesday.

(Completed programs will appear in the Advance Program for the Chicago Meeting).

Local Entertainment Plans

■ The Illinois State and Chicago Bar Associations will be the hosts. The two associations have appointed a joint committee which is in charge of the local arrangements. This joint committee, called the "Committee for American Bar Association 1954 Annual Meeting", is composed as follows: Richard Bentley of Chicago and Karl C. Williams of Rockford, *Co-Chairmen*, David J. A. Hayes, *Secretary*, Tappan Gregory, Harry G. Hershenson, Stephen E. Hurley, Albert E. Jenner, Jr., Harold L. Reeve and Benjamin Wham. The committee is engaged in making preliminary plans, some of which are indicated below. Special committees are being appointed to arrange and have charge of the details of each function.

Most of the lawyers in attendance will have a full schedule of meetings, and entertainment will be subordinated to the important work of the American Bar Association. Accordingly, most of the entertainment will be at times which do not conflict with meetings.

The events which are being planned include special church services for all faiths on Sunday, August 15, the day preceding the opening of the meeting. During the rest of the week there will be a tea and specially conducted tours of exhibits at the Chicago Art Institute, a luncheon and fashion show for visiting ladies, and on two evenings a gridiron musical show written and performed by members of the Chicago Bar Association.

Sightseeing trips during the week of the meeting are being planned to such outstanding local points of interest as the Museum of Science and Industry, the atomic pile at the University of Chicago, the Chicago Natural History Museum, the Shedd Aquarium, the Adler Planetarium, the Chicago Historical Society, etc.

Further plans will be announced as details are worked out.

The Committee's general policy with regard to entertainment is that it should be kept within bounds so as not to interfere with the important business of the meeting. The trend to more and more extensive entertaining each year must be reversed, in the opinion of the Committee, or in the future few cities will be able to act as hosts. The same general policy applies to entertaining by law firms and individuals. They are requested to refrain from any substantial entertaining. Instead, and more in keeping with the democratic spirit of the Association, Illinois lawyers are being urged to contribute to the general fund for the entertainment of all members of the American Bar Association in which everyone may join.

The President's Page

(Continued from page 179)

tration of criminal justice. Arthur H. Sherry, Professor of Criminology at the Law School of the University of California, is director of the planning phase of this study. A preliminary report is planned for the Annual Meeting in August.

Three other projects have been approved by the Research and Library Committee, and it is hoped these can be initiated at an early date. Many others are under consideration by the committee.

A final word about the American Bar Center campaign. As this is written, the campaign has passed the $1,000,000 mark on the way to the goal of $1,500,000 to be raised primarily among the members of the legal profession in the United States. Many thousands of lawyers have made their contributions to this most important enterprise of the legal profession, but many more have not. A great amount of work remains to be done before the final goal is reached. The Finance Committee, under the chairmanship of George Maurice Morris of Washington, D. C., has done a tremendous job and is entitled to the gratitude of the entire profession. The goal of completing the fund for the Bar Center before the Annual Meeting this year is in sight and can be reached with a small amount of extra effort on the part of all of us during the next few months.

Books for Lawyers

THE MACHINERY OF JUSTICE IN ENGLAND. *Second Edition. By R. M. Jackson. Cambridge: University Press. 1953. $6.00. Pages ix., 372.*

The AMERICAN BAR ASSOCIATION JOURNAL hailed the first edition of this work, published fourteen years ago, as "the simplest and most intelligent description of the English judicial system that has yet been written".[1] Equally high praise must be accorded this second edition, which is largely a new book, written to portray the postwar legal scene in England.

Originally designed as a protest against the academic tradition that imposed on the first-year course on the English legal system "a mass of historical study to satisfy the idea that it is cultural to know what happened in the middle ages and not cultural to know what happens in the twentieth century", the book sets out to describe "the present system for administering justice, how it really works, and what criticisms and suggestions have been made". The volume succeeds admirably in achieving its objective, despite the inevitable mass of detail that must be presented to describe accurately a complicated judicial establishment that is the growth of centuries. The work is a triumph in the orderly arrangement of its material, in its continual insistence on pointing out how things actually work, in the human interest of the examples it gives and in the more than occasional pungency of its comments.

A perusal of the volume raises a pertinent question for Americans: If, as the author says—and with much truth, it seems to me—"The best introduction to law is a study of the institutions and environment in which lawyers work", why should we not have such a course in the first year of our law schools instead of plunging our students into the problems of contracts, property and torts without giving them the slightest inkling of how courts and lawyers work in applying the doctrines of substantive law? I know of no book that covers a similar field in this country, and with our forty-nine jurisdictions the writing of it would be difficult, but the need for it is obvious not only for law students but for intelligent citizens generally.

For the increasing number of American judges and lawyers actually concerned with improving the administration of justice, the book has especial interest. Here we may compare, point by point, the working of the English judicial system and our own. The comparison is by no means as embarrassing as it was when the first edition appeared, for the past fifteen years here have witnessed a progress unparalleled in American judicial history: the Federal Rules of Civil and Criminal Procedure and their gradual acceptance in a considerable number of states, the Federal Administrative Procedure Act and the model code of state administrative procedure, the Administrative Office of the United States Courts and similar establishments in some of the states, the growth of judicial councils and conferences, the formulation and approval by the American Bar Association of minimum standards of judicial administration, the first and second "Hoover Commissions" and the various little Hoover Commissions in the several states, and finally the monumental Survey of the Legal Profession which is still in progress.

There was a time not so long ago when one might almost assume that in every respect English justice was superior to ours, but fortunately for us this is no longer so. True, we must continue to envy the English not only their appointment of judges to serve during good behavior, but the professional climate surrounding such appointments. On the other hand, the subject of court costs still continues to cast its dark shadows there, for the costs of a single lost lawsuit may spell financial ruin for the defeated litigant. Even on motions I have heard the question of costs argued with more force than the merits of the motion itself. These two matters of the appointment of judges and of costs present extremes, but at each point between these extremes we must critically weigh not merely the results in each system, but the causes underlying the difference in results. Studied in this way the volume is most rewarding, for one can count on the author's objectivity and his freedom from bias.

The book deals successively with civil jurisdiction, criminal jurisdiction, the personnel of the law, the cost of the law, special tribunals and the outlook for reform. Each chapter tempts one to comment but limitations of space forbid. Judges and lawyers from the several states will differ in their judgments as to the points in which their respective jurisdictions surpass or are inferior to the English practice and also as to the outlook for reform, but such a comparative appraisal cannot but have a stimulating effect on the growing determination here to improve the administration of justice.

ARTHUR T. VANDERBILT
Supreme Court of New Jersey

RADIO AND TELEVISION RIGHTS. *By Harry P. Warner. New York: Matthew Bender & Company, 1953. $35.00. Pages xi, 1954.*

In the spring of 1949, the AMERICAN BAR ASSOCIATION JOURNAL reviewed Warner's *Radio and Television Law* and welcomed it as a contribution to the field of radio and television jurisprudence.

We now welcome another significant contribution to the field of

1. 26 *A.B.A.J.* 539; June, 1940.

radio and television law—Warner's *Radio and Television Rights*, published in 1953 by Matthew Bender & Company.

Radio and Television Law deals primarily with the relationships between the radio and television industries and the Federal Communications Commission. This new volume is concerned with the remedies available for protecting radio and television programs.

Radio and Television Rights is not limited merely to these new media of mass communications; it is also a treatise on the law of intellectual property. The Copyright Code has been analyzed and discussed in substantial detail. The extent and scope of protection furnished by common law copyright, the law of unfair competition and the right of privacy are also discussed.

Several chapters in this volume merit special comment. Chapter XIII entitled the "Music Industry—The ASCAP Story" offers for the first time an explanation of the various problems attendant on the marketing of music. The prior literature on this subject concerned itself primarily with the adjudicated cases. Mr. Warner's book goes on to discuss the problems of the music industry against the background of the various performing right societies and other organizations engaged in the marketing and performance of music. Thus the roles of the American Society of Composers, Authors and Publishers; SESAC, Inc.; Broadcast Music, Inc.; the Song Writer's Protective Association; and the Music Publishers Protective Association are considered and evaluated, particularly in their relationships with the radio, television and motion picture industries.

Chapter XIX dealing with international copyright relations furnishes a comparative study and analysis of the laws of various countries dealing with the mechanical reproduction of music, motion pictures, radio and television. This chapter also furnishes a textual section-by-section analysis of the Universal Copyright Convention.

Discussion of a subject as dynamic as television must of necessity deal with the new legal problems tendered by this medium. The author discusses at length the extent to which the law of unfair competition has been employed to protect such matters as program titles and distinctive characters appearing in radio and television programs. There is extensive discussion of the effect of the service mark provisions of the Lanham Act on radio and television. The author criticizes—justifiably it seems to this reviewer—the Patent Office's denial of registration to distinctive characters appearing in radio and television programs. Mr. Warner feels that a truly distinctive character (he cites "Clarabel the Clown" on the "Howdy-Doody" program as an example) identifies the communication or entertainment service to the same extent as does the title of the program. However, since publication of *Radio and Television rights*, the Patent Office Examiner in Chief has issued an opinion limiting very severely the registrability of program titles. See *Ex parte The Procter & Gamble Co.*, 97 USPQ 78 (1953). Undoubtedly, Mr. Warner would not be in accord. He is definitely on the side of a liberal interpretation and application of the service mark provisions of the Lanham Act. The final word, of course, must come from the courts.

There is an excellent discussion relating to the attempt of performing artists to assert property rights in their interpretative performances. This subject is discussed in the light of the moral right doctrine and the adjudicated cases. The author takes the position that if interpretative rights are to be recognized in this country, it should be effectuated by Congress rather on a case to case basis. Several recent decisions, *e.g.*, *Granz* v. *Harris*, 198 F. 2d 585 (C. A. 2d, 1952), suggest that the courts may furnish a remedy for the unauthorized exploitation of performers' rights. This is another of those vexatious problems which will require clarification by the courts.

Also worthy of special note are the two chapters dealing with "Program Ideas". The author has recorded the gropings of the courts in attempting to furnish protection to a sequential combination of ideas reduced to concrete form. The law on this subject is in a state of flux. See *Kurlan* v. *CBS*, 97 USPQ 556; *Burtis* v. *Universal Pictures Company*, 97 USPQ 567 and *Weitzenkorn* v. *Lesser*, 97 USPQ 545. The author, however, is to be commended for attempting to reconcile and bring some semblance of order to this new and extremely important field.

Mr. Warner's latest book will surely be well received by the profession. It is at once scholarly and practical. It is to be regretted that the volume contains no table of cases. However, this is a relatively minor defect in an excellent treatise on an ever-changing field of law.

CHARLES S. RHYNE
Washington, D. C.

BASIC STRUCTURE FOR CHILDREN'S SERVICES IN MICHIGAN. *By Maxine Boord Virtue. American Judicature Society. 1953. $2.00. Pages 391.*

This remarkable volume is a demonstration of what can be accomplished by a happy combination of well-disciplined legal analysis and the seasoned techniques of professional research. As with her *Survey of Metropolitan Courts in the Detroit Area*, Mrs. Virtue has blazed a new trail.

My teaching career at Columbia Law School started with the course on domestic relations in 1915 when I substituted during the illness of Professor Nathan Abbott. We plowed through the old cases on parent and child, emancipation and custody. Even in those days when great bodies of law seemed settled and serene, the patter of the courts about "the welfare of the child" seemed far removed from reality. And in the intervening years I spent much of my professional time in litigation between husbands and wives, with a sprinkling of some very exciting child-custody cases.

It took Mrs. Virtue's book to make

me conscious of the fact that most lawyers go through their whole professional lives without even a smattering of knowledge of what has been done in the past generation to improve the lot of vast numbers of abandoned, dependent, illegitimate, handicapped and generally unhappy young people. Bit by bit educators, welfare and social workers, juvenile court judges and their staffs and a host of others have been laboring in the vineyard; and the story told in this book of the resulting mass of legislation and the inevitable overlappings of jurisdiction and areas of confusion is a truly thrilling one. The relief and public welfare agencies play a major role and other administrative agencies such as the State Department of Education, the Department of Health, the Crippled Children Commission, the Youth Commission and the Department of Mental Health are in the field as well. Numerous state and private institutions provide special services to children. The courts and the judges adjudicate not only on matters of adoption, legitimacy, custody and support, but in juvenile courts they formulate and carry through programs of rehabilitation, with more or less adequate facilities for detention, medical and psychiatric treatment and special assistants, such as friends of the court and county agents. Courts of criminal jurisdiction necessarily enter the picture too.

Against an informative historical background, the first three chapters provide an encyclopedia of carefully documented data relative to the seemingly endless variety of services provided for children in the State of Michigan. Doubtless the situation is much the same in other states. The sources of revenue to support these various administrative and judicial instrumentalities are set forth in great detail. As one proceeds, there comes an uneasy feeling that such an unwieldy mass of miscellaneous legislation must inevitably leave unfilled gaps where, due to lack of financial support or properly trained personnel, the system is bound to break down.

Gradually one becomes aware that interspersed with statements which catalogue the various agencies and the statutory pattern are large segments of invaluable information about what is actually taking place as the numerous administrative and judicial mills grind out their daily product. Differences between rural and urban parts of the state are shown, as well as considerable disparity in the training and competence of those performing the same functions. Short cuts of dubious legality are widely resorted to, not only in matters relating to the giving of notice to interested parties, but in "unofficial" cases in large volume where, without the filing of any petition, which is necessary to give the court jurisdiction, steps are taken to implement some program for the welfare of individual children. At times the cases are held open indefinitely with the thought that a postponement of disposition will hold out a reward for the good behavior of the litigants. As Mrs. Virtue states, "It is as if the court were preparing to cast off its judicial identity and to compete with public welfare and private agencies to administer general child welfare service." And, on the other hand, we find social workers taking steps which leave the courts little alternative to the giving of approval to accomplished facts, where changes of status and allied matters are clearly beyond the competence of mere administrators.

Those unfamiliar with the friend-of-the-court system, initated by Chief Judge Ira W. Jayne of the Circuit Court of Wayne County, and now almost universally used throughout Michigan, will find especially interesting the various parts of this book where the duties and functions of the friend of the court are discussed. This administrative adjunct of the Circuit Court, with broad powers of investigation, presentation and supervision of support and custody matters in divorce and other domestic cases, performs a herculean and indispensable task.

Whilst leaving the formulation of specific new legislation to others, Mrs. Virtue does not hesitate to bore into areas of controversy and she sketches the broad outlines of possible remedies for the conditions which she describes. Probably the part of the book which will be most valuable to lawyers and judges generally is the chapter in which the interrelation of administrative and judicial agencies is discussed. This is one of the finest pieces of legal writing that it has been my privilege to study. It is to be expected that there should be an area of conflict between the social workers, who in perfect good faith believe that in certain cases social service rather than judicial action is required, and those trained in the law, who see the necessity for proper notice, a fair and impartial hearing and a record of proceedings adequate for purposes of review. And it is equally natural that social workers should fail to understand that a court may be entirely competent to make effective all suitable methods of accomplishing the purposes for which the courts were established, including preventive activities and treatment.

The objectivity of the book is best attested by the comments of the Board of Advisers, some of which are added as footnotes here and there, and others collected in an appendix. This group of experts in the field of children's services have performed a substantial service by reading the manuscript before publication and frankly stating their views.

The foreword by Chief Justice Vanderbilt points the way to the future. His own rich background, his candor and the penetrating quality of his analysis have given us an additional chapter of great value. He knows just where the soft spots are and he does not hesitate to point them out.

Perhaps I should add an observation or two of my own. I hope many lawyers will take the trouble to study these materials. We should know more about the society in which we live, especially about significant developments in fields where the fees are few and far between. Moreover, I do not see how one can finish this

book without a feeling of optimism. It is reassuring to know that large numbers of intelligent and public-spirited people are constantly at work on the improvement of our basic institutions. That the multiplicity of miscellaneous provisions for the welfare of children which are described by Mrs. Virtue should have been made in this helter-skelter fashion over the past quarter-century in Michigan shows a general consciousness of the problem in all its many aspects and a determination to grapple with it. Moreover, this particular species of growth and development is healthy and normal. In the end it will give us the needed amount of integration plus the strength and vitality which go hand in hand with well-rooted institutions. That the judges and the social workers and the entire apparatus of the welfare agencies and the judicial establishment should be excited about their work and desirous of doing the best possible job makes me rejoice, even if they squabble a bit among themselves over questions of jurisdiction and what not.

But make no mistake. There is a job ahead and it is one of magnificent proportions. There is nowhere in existence today an integrated family court with full civil and criminal jurisdiction over divorce, juvenile matters, guardianship, adoption, and other miscellanies involving the welfare of children. Perhaps someday we shall see this come to pass.

HAROLD R. MEDINA
United States Court of Appeals
New York, New York

LAW AND THE FARMER. *By Jacob H. Beuscher. Springfield, Illinois: Springer Publishing Company, Inc. 1953. $4.95. Pages vii, 406.*

It may be regarded as a moot question whether or not any book seeking to bring law directly to the laity is justified. Of all the learned arts, the law lends itself least to this process. Its broad principles are often but shells, hollowed out by exception, distinction and refinement. Nowhere are generalities more deceptive.

Postulating the desirability of such a work, we admire its accomplishment. Compressing a mass of thought into a thimble of space requires the labor (1) of selection and elimination and (2) of condensed expression: words must be made to work hard for the author.

The hazard to the reader—of which he is usually unaware—is that of the brain being intoxicated by shallow draughts. He must never be permitted to forget that it is from the Pierian spring that he quaffs.

Now to the book at hand. It is well written in a familiar style, with a homespun, concrete example for nearly every abstract rule. It is rather easy reading for a lawyer, and, I should imagine, not too formidable for an intelligent farmer. After a brief outline of the juridical function in general, it proceeds to cover the many categories, and their practical application, of the law which are of particular interest to farmers. These categories are divided into three main areas: (1) legal problems when acquiring or transferring a farm, (2) transferring the family farm from one generation to the next, and (3) legal problems when operating a farm.

Despite the task of symmetrical abridgment, the author has been, in all cases where my knowledge permits of appraisal, scrupulously accurate. Here should be mentioned a further hazard of such an effort: that of disclosing to the reader the variety of statutes, and even common law rules, which may govern his legal relationships, depending upon which of the forty-eight states he happens to claim as his residence. This, Professor Beuscher frequently tries to surmount by tables summarizing the legislative or judicial expressions of principal farm states concerning the matter at hand. But I should say that it is one of the faults—perhaps hardly avoidable—of the book that it still fails to emphasize sufficiently the variances from state to state, and that it has too much Wisconsin in it for anyone not living there. The highly mutable nature of many sorts of statutory law is scarcely commented upon. I wonder if the farmer reader should not have been warned that before he finishes the book his legislature or the Congress may have rendered some of it obsolete.

Many lawyers will feel that the tendency, all too frequent as it is, of laymen to be their own lawyers may well be encouraged by this book, although it often admonishes of the necessity of seeking legal counsel. The validity of this criticism turns, again, upon the question of whether ordinary people are entitled to popularizations of technical knowledge, regardless of their ability to absorb and correctly apply them. If they misuse their little wisdom, is that the fault of the writer? And yet, the perils of oversimplification cannot be too much stressed. Perhaps the answer is that writer owes reader an amplitude of warning.

If the book is not unique as a compendium of farm law in popular terms, I believe that it certainly is in its discussion of the impact of such law on farm family and economic life and in the help it offers in selecting the legal device for solving the resultant problems. That many farmers can make sound use of it is not to be doubted. In short, you may recommend it to your farmer friends if you caution them first to read lines 15 and 16, Part II of Pope's *Essay on Criticism.*

MAX C. PETERSON
Hartford City, Indiana

FRANZ VON PAPEN'S MEMOIRS. *Translated by Brian Connell. New York: E. P. Dutton & Co., Inc. 1953. $6.50. Pages 634.*

Von Papen's *Memoirs* is a brooding, fiercely intense plea of vindication knowingly offered in a climate of antagonistic contemporaneous judgment. As a significant political figure in two eras of German history, during which his country played the dominant role in history's most destructive and cataclysmic wars, and in the emergence of an almost unbelievably monstrous political regime, von Papen sets himself the immensely difficult task of disproving personal moral guilt at a time

when civilization still recoils in horror in remembrance of the incredibly inhuman Nazi atrocities.

His effort is not entirely without success. There is a quality of intellectual persuasiveness, supported by a reasonable measure of documentation, which give to the *Memoirs* a stature as an historical statement entitled to more than casual rejection. Undoubtedly, von Papen's acquittal as a war criminal by the Nuremberg Tribunal reflects the probative value of the *Memoirs*, for in large measure the *Memoirs* is no more than restatement of the evidence offered in his defense to the Nuremberg charges. Unfortunately from von Papen's viewpoint, however, a completely definitive vindication is perhaps forever impossible, for the contrary evidence of his personal involvement with and adherence to Hitler and Nazism, though circumstantial in many respects, is forbidding, and the witnesses who might best have proved his case are long since dead.

Von Papen offers no excuse for Germany's guilt for World War II. He concedes frankly that Hitler and his entourage of inner cabinet officials, with whom he does not identify himself, must bear this onus. Though admitting his sympathy for reincorporation of Austria into the greater German state, von Papen places this objective in the context of ultimate historical necessity and disavows knowledge, complicity or collaboration in the events leading to the *Anschluss*, notwithstanding his position at the time as Minister to Vienna. Of Germany's nonaggression pact with Russia and the subsequent invasion of Poland, the decisive factors which ignited the war, von Papen likewise disclaims responsibility, knowledge or involvement. These he blames primarily upon the stupidity of von Ribbentrop and the then irreversible trend of Hitler's egomania. And to the charge that his continued service to Hitler during the entire war manifested a loyalty to the known evil aims of Nazism, von Papen answers that his service and loyalty were not to Hitler and Nazism, which he personally detested, but to the German nation and its people, and that any other course of action would have been treasonable to that greater responsibility.

The account of von Papen's service in Ankara, during which Turkey's fear of Russian aggression was shrewdly played against fear of German retaliation, resulting in Turkey's neutrality until almost the end of the war, is an absorbing tale of diplomatic technique which includes a detailed explanation of "Operation Cicero", surely one of history's most incredible stories of successful espionage and international intrigue.

Of particular interest to the legal profession is von Papen's analysis of the Nuremberg Tribunal and its relationship to prior concepts of international law and justice. If his charges of the juridical philosophy and prosecution techniques of the tribunal are trustworthy, they constitute a serious indictment of the traditional concepts of due process as understood in Anglo-American jurisprudence and cast suspicion upon the validity of our participation in this procedure.

The value of the *Memoirs* lies not in the recounting of von Papen's long and varied role as soldier, espionage agent, chancellor and diplomat, intriguing and exciting though these facets of an eventful life have been, but in his perceptive analysis of the historical factors that doomed the Weimar Republic almost from the moment of its inception and from which arose the Hitler movement. Thus there is placed in proper perspective the exclusive war-guilt clause of the Versailles Treaty, the first link in the moral degeneration of the German people; the narrow, unenlightened provincialism of the statesmen of the victorious allies who blindly insisted upon full satisfaction of Germany's reparation obligations, with its crippling and disruptive effect upon the national economy and the consequent collapse of the nation's financial institutions; and the failure of these same statesmen to recognize the portents of the new communist tyranny and the historical balance provided by Germany as an imperative unit in the coalition of European nations against the dangers of this eastern threat.

Implicit in this analysis is the judgment, assuredly speculative but nevertheless persuasive, that the tragic effects of this short-sighted policy could have been avoided, or at least minimized, had the vision of these statesmen not been obscured by irrelevant and inconsequential national objectives and by revenge motives inspired by an exaggerated fear and mistrust of Germany. Viewed in the light of the current world situation, the basic validity of this analysis is hardly subject to challenge.

Although the *Memoirs* has neither the objectivity nor the perspective necessary to qualify it as a permanent and reliable source of historical data, it is a significant contribution to the literature of our time and a remarkable testament of one of civilization's most tortured eras.

RUBIN G. COHN
University of Illinois
Urbana, Illinois

Review of Recent Supreme Court Decisions

George Rossman
Editor-in-Charge

ANTITRUST LAW

Verdict in Favor of Defendants in Treble-Damage Suit Affirmed

■ *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corporation,* 346 U.S. 537, 98 L. ed. (Advance p. 197), 74 S. Ct. 257, 22 U. S. Law Week 4061. (No. 19, decided January 4, 1954.)

This was a suit for treble damages and an injunction filed under the Clayton Act by the petitioner, owner of a suburban motion picture theatre in Baltimore. It was alleged that respondents, motion picture producers and distributors, had violated the antitrust laws by conspiring to restrict first-run pictures to downtown Baltimore theatres.

Mr. Justice CLARK, speaking for the Court, affirmed a general verdict for respondents, refusing to hold that the trial judge should have directed a verdict in favor of the petitioner. The opinion refused to construe as a conspiracy the "parallel business behavior" of the respondents, who had refused to grant petitioner's separate requests, first for exclusive and later for "day and date", first runs. The Court admitted that "circumstantial evidence of consciously parallel behavior" had made "heavy inroads" into the judicial attitude toward conspiracy, but said that conspiracy could not be read entirely out of the Sherman Act. Since the defendants had denied collaboration and had introduced evidence of local conditions and economic factors that precluded petitioner from becoming a successful first-run house, the Court held that fact issues for a jury had been raised.

The Court also disagreed with petitioner's contention that the trial judge's charge to the jury failed to give sufficient weight to the decrees in *United States* v. *Paramount Pictures, Inc.* While the Clayton Act makes those decrees prima facie evidence in this suit, the Court said that petitioner had failed to produce additional evidence needed to relate the earlier case with its own suit.

Mr. Justice BLACK would have reversed, on the ground that the trial judge's charge deprived petitioner of a large part of the benefits intended to be afforded by the prima facie evidence provision of the Clayton Act.

Mr. Justice DOUGLAS withdrew from the case after its submission and took no part in the decision.

The case was argued by Philip B. Perlman and Holmes Baldridge for the petitioner, and by Bruce Bromley and Ferdinand Pecora for the respondents.

CONSTITUTIONAL LAW

State Statute Permitting Use of Illegally Obtained Evidence in One County and Not in Another Does Not Deny Equal Protection

■ *Salsburg* v. *Maryland,* 346 U. S. 545, 98 L. ed. (Advance p. 207), 74 S. Ct. 280, 22 U. S. Law Week 4075.

Declaring that the equal protection clause relates to equality between persons as such rather than between geographic areas, the Supreme Court here affirmed convictions for violation of Maryland antigambling statutes. The convictions concededly rested on illegally obtained evidence.

A Maryland statute, known as the Bouse Act, adopts for misdemeanors the federal practice whereby evidence obtained by illegal search and seizure is inadmissible. Defendants challenged a 1951 amendment which exempts prosecutions in Anne Arundel County, where they were arrested, from the operation of the Bouse Act. It was alleged that such an exemption violated the equal protection clause of the Fourteenth Amendment.

Mr. Justice BURTON, speaking for the Court, held that the 1951 amendment was within "the liberal legislative license allowed a state in prescribing rules of procedure". The Court could find little substance in appellant's claim that distinctions based on county areas were necessarily so unreasonable as to deprive him of equal protection. Maryland could validly have granted home rule to each of its twenty-three counties, it was pointed out, allowing them to determine the rule of evidence by local option. From this, the Court reasoned that no constitutional limitation prevented the state legislature from determining the rule for each of the local areas.

The Court also found that nothing in the 1951 statute sanctioned illegal search and seizure.

Mr. Justice REED took no part in the consideration or decision of the case.

Mr. Justice DOUGLAS dissented on the ground that the Fourteenth and Fourth Amendments preclude the use in evidence of illegally obtained matter.

The case was argued by Herbert Myerberg for the appellant, and by Ambrose T. Hartman for the appellee.

CORPORATIONS

Jurisdiction of Courts of Appeals and District Courts Under Public Utility Holding Company Act

■ *General Protective Committee for the Holders of Option Warrants of the United Corporation* v. *Securities and Exchange Commission,* 346 U. S. 521, 98 L. ed. (Advance p. 188),

Reviews in this issue by Rowland L. Young.

74 S. Ct. 261, 22 U. S. Law Week 4063. (No. 184, decided January 4, 1954.)

The Public Utility Holding Company Act of 1935, 49 Stat. 803, 15 U. S. C. § 79 *et seq.*, requires each holding company to limit its operations to a single integrated public utility system and to reasonably related businesses. Acting under Section 11 (e) of the Act, the United Corporation, a holding company, submitted to the Securities and Exchange Commission a plan of voluntary reorganization which would convert United from a holding company into an investment company, so as to enable it to conform to the Act. The plan had four main features: (1) Sale by United of certain common stocks held by it; (2) An offer to United stockholders, giving them a means of withdrawing from the company if they wished; (3) Cancellation without compensation of outstanding option warrants for the purchase of United's common stock; and (4) amendment of United's charter and bylaws. The Commission entered orders approving the plan.

This was a suit filed under Section 24 (a) of the Act in the Court of Appeals for the District of Columbia Circuit by some of United's common stockholders for review of the plan. The Commission and United opposed the intervention on the ground that, by reason of the Commission's order and Section 11 (e) of the Act, only the District Court had jurisdiction to review the provisions of the plan respecting the elimination of the warrants and the amendments to the charter and bylaws.

The Supreme Court granted certiorari limited to the question which orders of the Commission were reviewable in the District Court and which in the Court of Appeals.

Mr. Justice DOUGLAS, speaking for a unanimous Court, ruled that the Court of Appeals was justified in taking jurisdiction over the controversy insofar as it related to the sale by United of its holdings and the offers it made to its stockholders who wanted to withdraw, but reversed the court insofar as it took jurisdiction over the plan to eliminate the outstanding option warrants and to amend the corporation's charter and bylaws. The Court pointed out that the difference between the two sections was that Section 11 (e) gives power to the District Courts to order enforcement of provisions of voluntary reorganizations approved by the Commission, while Section 24 (a) provides a means of appeal on issues raised by a reorganization to the Courts of Appeals by any "aggrieved person". The difference is not essentially in the scope of judicial review, it was said, but rather in the function that the two systems of review perform.

The Court said that there was nothing strange about routing the common stockholders to the Court of Appeals and the option warrant holders to the District Court, pointing out that "Nothing that one court does will impinge on the other. Each court will be performing a different function."

The case was argued by John Mulford for petitioner, by William H. Timbers for SEC, and by Richard Joyce Smith for the United Corporation, and by Randolph Phillips *pro se*.

COURTS

"Writ in Nature of *Coram Nobis*" in Federal Courts

■ *United States* v. *Morgan*, 346 U.S. 502, 98 L. ed. (Advance p. 177), 74 S. Ct. 247, 22 U. S. Law Week 4068. (No. 31, decided January 4, 1954.)

In this case, the Court upheld a motion "in the nature of the ancient writ of *coram nobis*" to review a 1939 conviction by the United States District Court for the Northern District of New York. Morgan, who had pleaded guilty, received a sentence of four years, which he served. In 1950, he was convicted by a New York court on a state charge. He received a longer sentence as a second offender because of the prior federal conviction. He thereupon filed this motion seeking an order voiding the 1939 federal judgment, alleging that his constitutional rights had been violated through failure to furnish him counsel.

In arriving at its decision, the Court, speaking through Mr. Justice REED, found power to grant the motion from the all-writs section of the Judicial Code. ("The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions agreeable to the usages and principles of law.")

The Court declared that there was "no compelling reason" to conclude that Section 2255 of Title 28 of the United States Code barred the motion. That section provides that a prisoner "in custody" may at any time move the court which imposed the sentence to vacate it if it violated the Constitution or laws of the United States. The Court apparently agreed with the Court of Appeals below that Section 2255 does not supersede "all other remedies which could be invoked in the nature of the common law writ of coram nobis".

Mr. Justice MINTON, joined by the CHIEF JUSTICE, Mr. Justice JACKSON and Mr. Justice CLARK, protested the Court's resurrection of *coram nobis* "from the limbo to which it had been relegated by Rule 60 (b) F. R. Civ. Pr. and 28 U. S. C. § 2255".

The case was argued by Beatrice Rosenberg for petitioner, and by Jacob Abrams for respondent.

■ In the January issue of the *Journal*, the name of Roger Arnebergh, of the Los Angeles Bar, was inadvertently omitted from the list of counsel who argued the case of *Atchison, Topeka and Santa Fe Railroad* v. *Public Utilities Commission of California*.

What's New in the Law

The current product of courts, departments and agencies

George Rossman • EDITOR-IN-CHARGE
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Actions . . . fraud and deceit.

■ A medium may be sued in an action for fraud and deceit by damaged spiritualist clients, the Supreme Court of Michigan held in a recent decision of first impression in American jurisprudence.

The medium challenged the sufficiency of the complaint with a motion to dismiss. The complaint alleged that the plaintiffs were believers in spiritualism, were deeply religious and were "interested in the mystical manifestations of religion". They claimed that, knowing this, the medium claimed to hear voices and passed on to the plaintiffs what the voices said—all of which did the plaintiffs no good. First, the medium supposedly tuned in on God and received advice that the plaintiffs should hang onto some $2,700 stock until it reached a value of $250,000. This never happened. The medium also received the word that the plaintiffs had oil on their land. They sank a $4,200 dry hole. The plaintiffs also received the classic Spanish-prisoner hoax letter. The medium advised them that the letter was genuine. They lost $8,500 on that deal.

The Court examined the elements of the action for fraud and deceit and found that the complaint met the tests. The contention of the medium that the action would not lie in the absence of an allegation that the medium had personally profited from the charged fraudulent representations was rejected.

(*Hyma et al.* v. *Lee et al.*, Sup. Ct. Mich., November 27, 1953, Carr, J., 60 N. W. 2d 920.)

Attorneys . . . requirements for administrative practice.

■ Some Philadelphia lawyers have lost out on their contention that only lobbyists *per se*, and not attorneys, are required to file informational statements under Section 12 (i) of the Public Utility Holding Company Act [15 U.S.C.A. §791 (i)].

That section makes it unlawful for any person employed or retained by any registered holding company to "present, advocate or oppose any matter affecting any registered holding company" before the SEC, FPC or Congress, unless he files with the SEC an informational statement covering a broad field, including the purpose of employment and compensation. The Philadelphia firm contended that the section was aimed at lobbyists and not at attorneys who represented registered holding companies before the Commission.

But the Court of Appeals for the Third Circuit found that the statutory language could not be so narrowed. While the section was doubtless aimed at lobbying, the Court said, it did not draw a fine distinction between normal representation of legitimate interests of a client and undesirable attempts to influence legislative or administration action for the benefit of a client. "The two might be inextricably interwoven", the Court declared.

The Court also rejected contentions that the section was unconstitutionally vague and discriminatory and that it had been repealed by the Federal Regulation of Lobbying Act and the right-to-representation provision of the Administrative Procedure Act.

(*SEC* v. *Morgan, Lewis & Bockius*, C.A. 3d, December 23, 1953, Maris, J.)

Constitutional Law . . . due process.

■ New York's 1953 law authorizing the state's Commissioner of Motor Vehicles to revoke summarily the driver's license of any person refusing to submit to a test for alcoholic content of his blood, has been found constitutionally wanting in due process protection by the Supreme Court of Orange County.

The statute provides that a motorist "shall be deemed to have given his consent to a chemical test" to determine alcoholic content of his blood, providing the test is administered by a police officer "having reasonable grounds to suspect such person of driving in an intoxicated condition". It further provides that only a licensed physician can withdraw blood, but that a police officer may administer urine, saliva or breath tests. Should the motorist refuse to submit to a test, the law states that the Commissioner "shall revoke his license. . . ."

A driver caught in the web of this statute refused to undergo the test. His license was revoked, and subsequently he was acquitted by a jury of a charge of drunken driving. He then challenged the Commissioner's action on several grounds of unconstitutionality of the statute.

Although reluctant to strike down a statute having as its objective the promotion of highway safety, the Court felt compelled to hold the license revocation procedure lacking in the fundamental elements of due

Editor's Note: Virtually all the material mentioned in the above digests appears in the publications of the West Publishing Company or in The United States Law Week.

process. Specifically the Court found the law defective because it failed to limit its application to cases where there had been lawful arrests and because it contained no "provision entitling the licensee to an ultimate hearing upon an adequate record before the final taking away of his license". The Court also expressed concern that the statute did not require a sworn statement over the police officer's signature when making the report to the Commissioner. The oft-expressed doctrine that the use of the highways and streets is a mere privilege, rather than a right, was curtailed by the Court. It stated that under modern automobile usage a driver's license should not be revoked without the licensee being given opportunity to be heard "upon all possible issues of law and fact".

The Court stated that the theory behind the statute was fundamentally sound and cautioned that its decision related only to an arbitrary revocation of a driver's license and that the case should not be read as changing the existing practice of requesting a lawfully arrested motorist to submit to a chemical test or of using the results of such a test when voluntarily taken.

The Court based its holding strictly on due process grounds and rejected contentions that the statute violated constitutional provisions against self-incrimination, unreasonable search and seizure and equal protection of laws.

(*Schutt* v. *MacDuff*, N. Y. S. C., Orange Co., January 2, 1954, Eager, J.)

Criminal Law . . . more on radar speed detecting devices.

■ Recently a New York court in *People* v. *Offerman*, 125 N. Y. S. 2d 179 (40 A.B.A.J. 150; February, 1954), reversed the speeding conviction of a motorist where the only evidence was furnished by a radar speed detector and there was no evidence presented at the trial as to the technical aspects of the detector and whether it was in good operating condition at the time of the arrest.

Now the reports reveal that a Delaware court had occasion to consider a similar device two days later. In a charge to a jury trying a motorist indicted for speeding, in the Superior Court of Delaware, Kent County, the judge instructed that a radar speed meter should be recognized as a reliable instrument to record the speed of automobiles the same as an ordinary speedometer, and that the jury might find the defendant guilty from the evidence of the speed detector alone if it were convinced that it was in proper operating condition at the time of the arrest.

The judge's charge indicates that the State produced an expert witness who detailed the construction, operation and purpose of the electronic device and the means of testing its accuracy. This New York was unable to do in the *Offerman* case.

(*State* v. *Moffitt*, Super. Ct. Del., Kent Co., September 23, 1953, Terry, J., 100 A. 2d 778.)

Criminal Law . . . polygamy.

■ Arizona's Short Creek affair—the arrests of several men of a discredited religious group who were maintaining a polygamous community in a remote section of the state—has ended with the defendants receiving one year probation each. The defendants pleaded guilty to a conspiracy charge and the trial judge in sentencing the accused made an exceptionally acute analysis of the crime and dispassionate appraisal of the punishments possible.

The defendants were members of a religious sect claiming Mormon background, but they had long since been expelled from the Mormon Church. Their community—operated on a sort of communistic basis called the "United Effort Plan"—was located near the Utah-Arizona boundary. Previous attempts by Arizona authorities to stamp out the polygamy practiced in the community had been defeated by the inhabitants' convenient dodge of taking refuge in Utah.

In sentencing the defendants, Judge Robert S. Tullar, of the Superior Court for Mohave County, dismissed intimations by the defendants that the Bible supported polygamous living. The Court said he had examined the Bible and that he had "used the concordance as a lawyer might use a cross-index . . ." but that he had found no approval of plural marriages. But further than biblical law, the Court declared, polygamy could not "be defended upon an ethical or sociological basis". In our present society, the Court remarked, women have equal rights and cannot be told "whom to marry and when". He continued:

> Gentlemen, our way of life does not permit the practice of polygamy in America today. You gentlemen had to be stopped. You were fairly treated. There has been no persecution, even though your crime has been enormous. . . . Punishment follows crime. It is not easy, however, to fix your punishment . . . .

The Court then noted the various theories of punishment. He disowned the theory of "society revenge" and also the theory of rehabilitation, saying that he didn't think he could rehabilitate the defendants. The theory of punishment being a deterrent to others was likewise turned down because the Court felt imprisonment would not deter "other fanatics from doing likewise". The Court then sentenced the defendants to one year of probation, requiring them to submit monthly written reports stating their place of residence and that they had not practiced polygamy during the preceding month. He promised imprisonment to probation violators, and ended by saying:

> Gentlemen, you are now on probation. You take with you my fear that you will fail; my hope that you will succeed; my hatred of your crime; my love of you as my fellow men.

(*State* v. *Johnson et al.*, Super.Ct. Ariz., Mohave Co., December 7, 1953, Tullar, J. NOTE: The statement of the Court on sentencing is not published. This department is indebted to Judge Claude McColloch, of the United States District Court for Oregon, for a transcript of the remarks.)

Damages . . . amount.

■ The Supreme Court of Florida has affirmed a damage award of $225,360 for a power company lineman who suffered severe and manifold permanent disabling injuries when a pole broke and he jumped to the ground to avoid contact with power lines.

The plaintiff was the employee of an independent contractor who had a contract with the power company to remove and replace defective poles. The company had furnished the independent contractor with a list of defective poles, but the list simply showed them designated as "bad" without stating whether the defect was above ground and visible or below ground and not visible. The particular pole involved was apparently rotten at or below the ground level and neither the plaintiff nor his independent contractor-employer knew this. The Court held that Florida law required the power company to warn the independent contractor of the danger, and thus the power company was properly found liable.

On the damages question, the Court found there was no passion or prejudice exhibited by the jury and that the manifold injuries to the plaintiff, rendering him a helpless invalid for the rest of his life, had a reasonable relation to the injuries and damages proved.

(*Florida Light and Power Co.* v. *Robinson*, Sup. Ct. Fla., December 9, 1953, Sebring, J., 68 So.2d 406.)

Declaratory Judgments . . . when needed.

■ The Court of Appeals of New York has refused to entertain a separated wife's action for a declaratory judgment that she is still married to her husband, despite the fact that he had procured a supposed Virgin Islands' divorce and remarried. In such a situation, the Court declared, a declaratory judgment is not necessary since the granting by a New York court of a legal separation conclusively affirms the existence of the marriage.

The history of the litigation was that, while the wife's suit for separation was pending, the husband was enjoined from obtaining a divorce in the Virgin Islands in an action he had already commenced there. Defying the injunction, the husband did obtain the divorce, returned to New York, remarried and continued to live in New York City with his supposed new spouse as husband and wife. He had answered his first wife's separation action and consented to a decree therein with an alimony provision.

The Court said that the primary fact to be established in the separation action was the existence of a marriage. Since a decree was entered in that suit, that fact was established. The present action for a declaratory judgment, the Court continued, was therefore unnecessary.

(*Garvin* v. *Garvin*, C. A. N. Y., December 3, 1953, Lewis, J., 116 N. E. 2d 73.)

Evidence . . . vouching for witness.

■ The Court of Appeals for the Third Circuit has indicated dissatisfaction with one of the hoary rules of evidence—that one who calls a witness is bound by, or vouches for, the witness' testimony—and has refused to apply it in a wrongful death case where the plaintiff's only proof of the circumstances of the death had to come from the defendant's employee who was charged with unjustifiably killing the decedent.

The employee was called by plaintiff because he was the only person who could testify to the affray which resulted in the death. He was not examined as under cross-examination. He of course gave testimony favorable to himself and to his employer, the defendant. Nevertheless the jury returned a verdict for and awarded damages to the plaintiff. The defendant sought to invoke the rule that the plaintiff was bound by the witness' testimony since he was called by the plaintiff and that since the testimony was adverse to the plaintiff's case the verdict should be reversed.

But the Court refused to invoke the rule. "Nothing could make the rule look more foolish than its application in a case like this", the Court said. The Court noted that evidence writers from Wigmore to Morgan have excoriated this particular rule of evidence and it pointed out that Rule 106 of the Model Code of Evidence framed by the American Law Institute abolishes the rule.

(*Johnson* v. *Baltimore and Ohio Railroad Co.*, C. A. 3d, December 18, 1953, Goodrich J.)

Labor Law . . . picketing.

■ A Manhattan liquor store proprietor has been successful in enjoining picketing and an accompanying boycott of his store instituted by a union which supposedly was seeking to organize his three clerks. The Appellate Division, First Department, held that the union was exerting economic pressure to force the employer to sign a contract with the union, rather than engaging in legitimate organizational activity.

The picketing began in October of 1951 when the union's agent first approached the employer. The three clerks declined to join the union and maintained that attitude throughout the entire period, including the litigation. The union itself never made any claim of representing the employees. Nevertheless the store was picketed and deliveries were stopped. When the proprietor attempted to have deliveries made to warehouses, the union had them halted.

The Court noted that the result of this activity was that the employer was faced with the alternatives of either signing with a union which did not represent his employees or going out of business. "The conclusion is inevitable", the Court declared, "that the picketing here included an unlawful objective in that it sought to coerce the employer into signing a contract . . . to violate the state labor relations act. . . ."

(*Wood* v. *O'Grady et al.*, N. Y. S. C., App. Div., 1st Dept., December 15, 1953, *per curiam*.)

Labor Law . . . sustaining findings.

■ Much has been written about the rule that an order of the NLRB must be judicially enforced if supported by the record taken as a whole. But what happens if the Board reverses its own examiner and makes findings different from his?

This was the situation presented to the Court of Appeals for the Fifth Circuit and the Court applied the ordinary *Universal Camera* rule. It held that the findings of the Board, not the examiner, were those presented for review and that the Board's findings, even though differing from those of the examiner, were supported by the record taken as a whole. An enforcement order was issued accordingly.

The Court had high praise for the examiner's conduct, but thought that he was perhaps paying too much "fealty" to the rule that the NLRB must prove its complaint by sufficient and convincing evidence. The Court also congratulated the examiner for attempting to follow the rule of the Taft-Hartley Act that no employee shall be ordered reinstated if he was discharged for cause.

But, the Court said, "notwithstanding our feeling" that the examiner had done a good job, the facts determined by the Board were those presented for sustaining and they were supported by evidence.

(*NLRB* v. *Akin Products Co.*, C. A. 5th, December 22, 1953, Hutcheson, C.J.)

Military Law . . . command influence of courts martial.

■ In its first consideration of the problem of command influence and control of courts martial under the Uniform Code of Military Justice, the United States Court of Military Appeals has held that a commanding officer went beyond permissible limits in a pretrial conference with members of the court martial and has set aside the accused's conviction of larceny.

One of the most controversial aspects of military law has been the extent to which commanders have exercised control over courts martial through the power of appointment of members of courts and the fact that court members are always subordinate officers of the appointing commander and consequently must stake their careers on his pleasure. In enacting the Uniform Code, Congress recognized that military justice and military discipline are interwoven and attempted to compromise between an entirely independent court-martial system and the command-appointed system.

Thus the Code provides that no commander shall "censure, reprimand, or admonish" a court martial for any finding or sentence, nor shall he "attempt to coerce or, by any unauthorized means, influence the action of a court martial" in reaching findings or sentence. But there was also written into the new (1951) *Manual for Courts-Martial* a provision permitting a convening authority [commander] to give those whom he has appointed to a court martial instructions as to rules of evidence, burden of proof and the like, and "as to the prevalence of offenses which have impaired efficiency and discipline. . . ."

In the instant case the appointing commander conducted a pretrial conference with the court immediately before the accused's trial. During this conference he read some instructions from the Army commander. Then he added some comments of his own to the effect that the court martial should not usurp the prerogatives of the reviewing authority (himself) and that it had been his experience that court-martial proceedings received a thorough review at Army level. He also read a letter from higher headquarters stressing the importance of courts martial imposing dismissal from the service as a part of the sentence of those convicted of larceny. This letter also stated that it was proper to recognize an officer's proper performance of his court-martial duties by notation on his efficiency report.

The Court ruled that the total effect of the commander's course of action was "prejudicial to the accused". The Court said: "With these admonitions ringing in their ears, the members began to hear this case on its merits. It requires little imagination to arrive at the reason why a finding of guilty was returned and the maximum sentence imposed. . . . The conviction and sentence in this instance are the product of a trial not founded on those fundamental rights and privileges granted to one tried in the military system."

(*U. S.* v. *Littrice*, U. S. Ct. Mil. App., December 11, 1953, Latimer, J., 3 U. S. C. M. A. 487.)

Municipal Corporations . . . civil service dismissal.

■ The Supreme Court of Illinois has reversed the civil service dismissal of a Chicago police captain who received $30,000 in cash in 1937 from a reputed professional gambler. The charge upon which the dismissal was based alleged that the police captain —Thomas Harrison—had violated a department rule that subjects to disciplinary action any police officer for "receiving or accepting a reward or gift from a person for a service rendered or pretended to be rendered as a member of the Department. . . ."

Apparently nothing was known of the $30,000 until Harrison testified before the Kefauver Committee in 1950. Upon request, he submitted a full report of his testimony and this largely formed the basis of the case against him. At the civil service hearing, he related that he first met the supposed gambler (a man named Lynch) quite casually in 1931 at a dentist's office. A friendship, including interfamily visits, developed. Lynch had been kidnapped before the meeting and feared some type of further violence. In his off-duty hours, Harrison accompanied Lynch as a sort of bodyguard. In 1937 Lynch gave Harrison the $30,000, and Harrison remonstrated that he never expected to be paid for anything he had done for Lynch. The friendship and companionship of the men continued until Lynch's death in 1945.

From this the Court found that the civil service commission's findings that Harrison had violated the department rule were not supported "by a scintilla of evidence" and were rebutted by the testimony of Harrison, who was practically the only person who testified to the relationship with Lynch. The Court said there was no evidence that Lynch was a gambler and that there was no showing that the money was for a "service rendered or pretended to be rendered" as a policeman. At the time, the Court stated, Harrison was a sergeant and not deemed to be on duty at all hours. What he did in his off-duty hours, the Court implied, was his own business, unless those off-duty activities involved conduct affected with moral turpitude.

Two justices dissented on the ground that there can be no clear distinction between a police officer's on-duty and off-duty hours and that, since bodyguarding is a distinct police function, the commission could properly draw an inference that Lynch formed and cultivated the association for the purpose of securing protection, not by just anyone, but by a police officer.

(*Harrison* v. *Civil Service Commission et al.*, Sup. Ct. Ill., September 24, 1953, as modified on denial of rehearing November 16, 1953, Maxwell, J., 115 N. E. 2d 521.)

Negligence . . . business invitees.

■ If you're a business invitee and slip on a banana peel in Massachusetts, you'll recover only if you can prove that the banana peel was placed there by the owner and his agents or that it had been there so long that the owner should have discovered and removed it.

That is the ruling of the Supreme Judicial Court of Massachusetts in a case involving a barroom patron. The Court held that the case should not have gone to the jury. All the plaintiff had been able to show was that he had slipped on a stairway, that the banana peel was on one of the steps and that it was dark. This was a far cry, the Court declared, from showing that the proprietor was responsible for the peel being there or that it had been there long enough for him to know about it.

(*Uchman* v. *Polish National Home, Inc.*, Sup. Jud. Ct. Mass., December 3, 1953, Spalding, J., 116 N. E. 2d 145.)

Patents . . . "flash of genius".

■ Although it believes that the Supreme Court's "flash of creative genius" remark in 1941 in *Cuno Engineering Corp.* v. *Automatic Devices Corp.*, 314 U.S. 84, has been overrated, the Court of Appeals for the Ninth Circuit has held that Congress' 1952 revision of 35 U.S.C.A. §103 has "emasculated" that phrase in the sense that Congress understood it.

In the *Cuno* case the Supreme Court, speaking of patentability, said that a "new device . . . must reveal the flash of creative genius, not merely the skill of the calling". The 1952 revision declared that "patentability shall not be negatived by the manner in which the invention was made". The Reviser's note interpreted this to mean that "it is immaterial whether [the device] resulted from long toil and experimentation or from a flash of genius".

In the instant case the Court indicated that it thought the Supreme Court's phrase was used more for emphasis than "patent dogma" and that the *Cuno* decision did not change any patent law. The Court recognized, however, that Congress apparently thought differently, and went on to declare that the statute revision effectively laid to rest the "flash of genius" remark as to future patents and also as to the unexpired one involved in the instant case.

(*Pacific Contact Laboratories, Inc.* v. *Solex Laboratories, Inc.*, C.A. 9th, December 9, 1953, Stephens, J.)

Taxation . . . income tax . . . embezzled funds.

■ Did the Supreme Court in *Rutkin* v. *U.S.*, 343 U.S. 130, holding that money extorted under death threats was income within I.R.C. §22(a), overrule or impair the ruling in *Commissioner* v. *Wilcox*, 327 U.S. 404, that embezzled money is not taxable income?

The Court of Appeals for the Third Circuit was faced with reconciling these decisions and, while not finding *Wilcox* overruled, ruled that the facts before it more nearly corresponded to the *Rutkin* situation "particularly in view of the gloss put on the *Wilcox* case by the *Rutkin* decision".

In the instant case the taxpayers were stockholders, directors and officers of two corporations, one wholly owned by the other. By means of fictitious accounting entries, chiefly understated sales and overstated purchases, they were able to disburse quite a bit of money to themselves without such payments appearing on the books. The Commissioner claimed this was income to them, particularly in view of the fact that the taxpayers' families owned about 90 per cent of the stock of the dominant corporation.

The taxpayers contended that they had really embezzled the money and to bolster this showed that their indebtedness had been noted on the corporation books and partial restitution, with a note for the remainder, had been made.

The Court distinguished the present case from the *Wilcox* case on the ground that here the taxpayers were more than mere employees—they were also controlling owners. Thus, the Court said, they were to a large extent receiving their own money and not embezzling. The Court also distinguished on the point that Wilcox had been prosecuted and convicted whereas the present taxpayers had not.

One judge dissented on the ground that this was a case of embezzlement—whether criminal proceedings were commenced and no matter what proprietary interest the taxpayers had—and that the *Wilcox* case controlled.

(*Kann et al.* v. *Commissioner*, C. A. 3d, December 31, 1953, McLaughlin, J.)

Taxation . . . income tax . . . gifts.

■ The Court of Appeals for the

Third Circuit has ruled that an "honorarium" paid by a church congregation to a retired minister "as pastor emeritus" is not taxable income but a gift excludable from gross income under I.R.C. §22 (b) (3).

The Court examined the circumstances under which the payment to the pastor arose. It found that the church officers had established the payment out of love and affection for the retiring pastor and that it was a "free gift of a friendly, well-to-do group who as long as they were able and because they were, wished their old minister to live in a manner comparable to that which he has enjoyed while actively associated with them". The Court also noted that the church's action gave the taxpayer no vested interest in future payments, since the church was free to halt the payments at any time.

The Court quoted with approval from *Schall* v. *Commissioner*, 174 F. 2d 893, that "the mere use of the terms 'salary' and 'honorarium' do not convert [a] gift into a payment for services".

(*Mutch* v. *Commissioner*, C.A. 3d, January 13, 1954, McLaughlin, J.)

Unauthorized Practice . . . tax returns.

■ The Supreme Court of Rhode Island has held that a nonmember of the Bar, who is also not a certified public accountant or a member of the American Institute of Accountants, is not entitled to prepare federal income tax returns for others, except where all income is subject to withholding, is under $5,000 and the standard form of deduction is employed.

The ruling is based on a Rhode Island statute which enumerates the group of persons who may prepare on behalf of others any federal, state or municipal return or report, or advise another person in such preparation. The present action was instituted by the members of the Committee on Illegal Practice of the Law of the Rhode Island Bar Association. The respondent, an insurance broker, had held himself out to advise clients with regard to tax returns and to prepare the returns. He had prepared long-form 1040s and also 1065s.

The Bar Committee had not sought to restrain the respondent from preparing simple all-withholding type returns.

(*Rhode Island Bar Association et al.* v. *Libutti*, Sup. Ct. R.I., November 18, 1953, O'Connell, J., 100 A. 2d 406.)

Wills . . . class gifts.

■ The rules relating to the time of vesting of a class gift have been applied by the Court of Appeals for the Fourth Circuit to defeat the Attorney General in his attempt under the Trading with the Enemy Act to recover a testamentary bequest in favor of some German legatees.

The provision of the will in question read: "I also want my husband's family in Bremen, Germany, the Stellohs and Kleintitschens, to share in my estate (should they survive this war) to the extent of $20,000.00." It was stipulated that the testator knew the difficulties in giving money to enemy aliens during wartime and also knew that legally the war would not be over immediately upon the cessation of hostilities, since her deceased husband had had some experiences with the Government in this regard during World War I.

The Court held that the bequest was a class gift intended to vest at the legal or technical conclusion of the war, and that the class of beneficiaries were to be determined as of that time and not as of the date of the testator's death. Consequently, the Court ruled, there was never any vesting while the beneficiaries were in enemy alien status. But further, the Court stated, since at the time of the testator's death in April of 1945 it was not certain that the gift would vest within the time prescribed by the Rule against Perpetuities, the gift failed and the property went under the residuary clause of the will.

(*Brownell, Jr.* v. *Edmunds, Jr.*, C.A. 4th, December 17, 1953, Parker, C.J.)

What's Happened Since . . .

■ On January 5, 1954, the Supreme Court:

DENIED CERTIORARI in *Weiss* v. *Johnson*, 206 F. 2d 350 (39 A.B.A.J. 1006; November, 1953), leaving in effect a decision of the Court of Appeals for the Second Circuit that the Commissioner, although recognizing a family partnership as bona fide for tax purposes, may nevertheless reallocate distributions of income and salaries if they are not in reasonable accord with the capital contributions and services of the partners.

DENIED CERTIORARI in *Abney* v. *Campbell*, 206 F. 2d 836, (39 A.B.A. J. 1006; November, 1953), leaving in effect a decision of the Court of Appeals for the Fifth Circuit that Congress' application of old-age benefits to domestic servants through coverage under the social security system, with collection of the tax a responsibility of the employing householder, is not unconstitutional.

■ On January 11, 1954, the Supreme Court:

AFFIRMED the decision of the Court of Appeals of Maryland in *Salsburg* v. *State*, 94 A. 2d 280 (39 A.B.A.J. 410; May, 1953), that Maryland had not violated the equal protection clause of the Fourteenth Amendment by removing, as to three counties only and as to gambling prosecutions, the state's statutory ban on the use of evidence obtained through illegal search and seizure.

■ On January 18, 1954, the Supreme Court:

REVERSED the decision of the New York Court of Appeals in *Commercial Pictures Corp.* v. *Board of Regents*, 113 N. E. 2d 502 (39 A.B.A.J. 1003; November, 1953), that under a New York statute the state's Board of Regents had constitutionally applied its prepublication censorship and licensing powers to prohibit the showing of the motion picture *La Ronde* on the grounds that its exhibition was "immoral" and "would tend to corrupt morals". Without majority opinion, the case was reversed on the authority of *Joseph Burstyn, Inc.*, v. *Wilson*, 343 U. S. 495.

Tax Notes

* Prepared by Committee on Publications, Section of Taxation, Harry K. Mansfield, Chairman.

Thin Incorporation

* One of the tax disadvantages of doing business as a corporation is the double taxation of corporate income. The income is taxed first to the corporation, when earned, and again to the stockholders when distributed to them in the form of dividends. The double tax does not spring from economic realities, but from the legal concept of the independent corporate entity.

If corporate profits can be distributed to stockholders in a form which results in a deduction from corporate income, the disadvantage may be removed or lessened. Therefore, one of the basic aims which many corporate tax plans seek to achieve is the avoidance of double taxation.

Corporations may secure a deduction for interest payments on money borrowed. A stockholder may also be a creditor of his corporation. If, therefore, a corporation can be financed largely with capital borrowed from its stockholders, corporate earnings may be distributed in the form of interest payments which are deductible in computing the corporate income tax. There is, of course, no similar deduction for dividend distributions to the stockholders. When this type of debt financing is carried to a point where there is an unreasonably low proportion of stock held ratably with notes or debentures, it is popularly referred to as "thin incorporation".

In addition to securing an interest deduction, the thin incorporation is supposed to achieve the following tax advantages:

(1) Corporate earnings may be distributed to pay debts. Thus, a stockholder-creditor may withdraw a portion of his investment in the corporation through repayment of his loan, without personal income tax. Receipt of a payment of a loan is not income. The partial liquidation of a stock interest, however, may constitute a taxable dividend under Section 115 (g) of the Internal Revenue Code, to the extent of the corporate earnings and profits.

(2) It helps to delay the impact of the Section 102 penalty tax. Earnings are not improperly accumulated if they are retained to repay loans. A corporation is not in a position to distribute earnings until it has provided for the payment of its debts. Consequently, an undercapitalized corporation will not reach the point of "improper accumulation" of its surplus as quickly as a corporation with a smaller debt structure.

(3) Finally, if the business should fail, the stockholder may have a capital loss by reason of the worthlessness of his stock. However, amounts loaned to the corporation will qualify as bad debts. Under certain circumstances, the stockholder may have the benefit of an ordinary bad-debt deduction.

All of these possible tax advantages are beset with tax penalties. If the device of thin incorporation should fail, the advances by the stockholders would be considered capital contributions and not loans. In that event, every one of the advantages sought will disappear—the interest deduction will be disallowed; the argument against the Section 102 penalty will fail; a full bad-debt deduction will not arise and, most important, repayments of the "loans" may be treated as having the effect of taxable dividends. If the taxpayer is in a high tax bracket, the effect may be confiscatory.

Since 1943, the Tax Court has disallowed bad-debt and interest deductions in about twenty cases, based either in whole or in part on the factor of thin incorporation.[1] It is obvious, therefore, that the dangers inherent in this device must be carefully guarded against. How thin can a corporation get before the Commissioner can see through it? There is no easy or ready answer. The Code and the Regulations are silent on what constitutes an unreasonably low capitalization. To find the law, we must examine the decided cases, but even here we find no definite formula or fixed ratio. Each decision is founded on its own facts.

Historically, the first reason for the use of debt in close corporations was to take advantage of the deductibility of interest. This use of some debt instead of all stock goes back over thirty years, as evidenced by court cases. Most of the early litigation involved "hybrid securities" which sought to achieve debt, but not fixed interest obligations, that is, to combine the business advantages of stock and the tax advantages of debt. The courts analyzed the instruments to determine whether the contract between the corporation and the stockholder intended repayment at all events or whether it revealed a disguised capital contribution placed at the risk of the business. Such factors as fixed maturity date, certainty of payment, enforceability on default, equality with other creditors, definite rate of interest, payment of interest regardless of earn-

1. For full discussion and listing of cases, see Fuchs, "Thin Incorporations—Debt or Stock?" 5 *American University Tax Institute Lectures* 141 (1953). Professor Fuchs's analysis has been followed in this note. See also Semmel, "Tax Consequences of Inadequate Capitalization", 48 *Col. L. Rev.* 202 (1948); Note: Loan Versus Investment—Inadequate Capitalization, 5 *Tax L. Rev.* 424 (1950); Schlesinger, "'Thin' Incorporations: Income Tax Advantages and Pitfalls", 61 *Harv. L. Rev.* 50 (1947).

ings, absence of control, all indicated debt. No special consideration was given to the matter of thin capitalization. Securities were held to be true debts if they had all the formal characteristics of debt, even though they comprised a very large part of the corporate capital. See *Com.* v. *O.P.P. Holding Corp.*, 30 B.T.A. 337 (1934), *aff'd* 76 F. 2d 11 (2d Cir. 1935) where the ratio of bonds to stock was 25 to 1.

The next step in the development of the thin incorporation rule was the refusal to recognize stockholder debt because the debt represented the entire capital of the corporation. Thus, in *Edward C. Janeway*, 2 T.C. 197 (1943), *aff'd* 147 F. 2d 602 (2d Cir. 1945), a taxpayer advanced money to a corporation receiving a $1,000 note and six-tenths of a share of stock for each $1,000 advanced. The corporation had no other assets or capital except these advances. On dissolution, taxpayer claimed a bad debt by reason of the worthlessness of his notes. In denying the deduction, the Tax Court pointed out that although the advances were made in the form of loans, they constituted the corporation's only source of working capital. The possibility of repayment was no stronger than the business and its possible success. Hence the funds were placed at the risk of the business, just like a capital investment.

In none of the cases decided up to this point was any serious consideration given to the ratio of debt to stock. That factor was injected into this field by the dictum of Mr. Justice Reed in the *Kelley* and *Talbot Mills* decisions:

> As material amounts of capital were invested in stock, we need not consider the effect of extreme situations, such as nominal stock investments and an obviously excessive debt structure. [321 U. S. 521, 526 (1946).]

The ratio of debt to capital in the *Talbot Mills* case was 4 to 1. Whether a ratio below 4 to 1 was automatically safe, and one above that figure obviously bad, was not indicated. The decisions started a quest for permissible ratios which has been referred to as the "numbers game".

The 4-to-1 ratio has not been adopted as the sole criterion. In a number of cases in which the debt-capital ratio exceeded 4 to 1, debt classification was sustained because of the presence of certain other favorable factors. Thus, in *New England Lime Co.*, 13 T. C. 799 (1949) (acq.), where the ratio of debt to stock was 10 to 1, the interest deduction was allowed because the stockholders did not hold the debentures in a uniform proportion to their stock, and the stock and bonds were widely distributed. See also *Weldon D. Smith*, 17 T. C. 135 (1951) (nonacq.), *rev'd* on another issue, 203 F. 2d 310 (2d Cir. 1953). On the other hand, the Tax Court denied debt classification in two cases where the ratio did not exceed 4 to 1 because there was no proper allocation between the capital stock account and the debt account at the time the debt was created, the allocation having been made later when the corporation decided that it would be advantageous to characterize the amounts advanced as debts. *Sam Schnitzer*, 13 T. C. 43 (1949), *aff'd* on opinion below, 183 F. 2d 70 (9th Cir. 1950); *Wilshire & Western Sandwiches, Inc.*, 7 T. C. M. 406 (1948), *rev'd* 175 F. 2d 718 (9th Cir. 1949). In the *Wilshire* case, the Ninth Circuit Court, in reversing the Tax Court, stated that indebtedness must be recognized where the stockholders intend to become creditors. It did not matter that debt was proportional to stockholdings.

The final step in the development was the decision in *Isidor Dobkin*, 15 T. C. 31 (1950), *aff'd* 192 F. 2d 392 (2d Cir. 1951), in which the disallowance of debt held in direct proportion to stock holdings rested on inadequate capitalization alone, even though the notes qualified as debts in every other respect. The ratio of debt to capital in the hands of the stockholders was 13 to 1 (35 to 1 if outside debt was also considered). When the corporation was liquidated, the bad debt deduction was denied by the Tax Court which said in part:

> When the organizers of a new enterprise arbitrarily designate as loans the major portion of funds they lay out in order to get the business established and under way, a strong inference arises that the entire amount paid in is a contribution to the corporation's capital and is placed at risk in the business.

Since the *Dobkin* case, the Tax Court has refused debt recognition in a number of cases in which the ratios ranged from 6-½ to 1 to 870 to 1. In other cases, it denied bad debt deduction where the ratios were less than 4 to 1, but in each case there were other facts present which could have led to this conclusion.

Something new was added in the case of *Ruspyn Corp.*, 18 T. C. 769 (1952) (acq.). The Tax Court upheld a ratio of 3-½ to 1, and the Commissioner acquiesced in the decision. This case would represent a guide post, if it were not for the fact that certain statements of the Tax Court raise further doubts. The Tax Court noted that there was a good business reason for the issuance of debt securities, and that this factor was favorable to debt recognition. It also emphasized the reasonable expectancy which existed at the time of organization that dividends would be paid. The extent to which these factors will be insisted upon is not apparent at this time, but they can only serve to becloud an already confused issue.

While there is no simple answer to the thin incorporation problem, the following suggestions may be helpful:

1. The form of the instruments should clearly evidence debt, with due regard to the factors mentioned above.

2. Hybrid securities should be avoided.

3. If loans are made by stockholders, they should not be proportionate to stockholdings.

4. If possible, debt and stock should be held by different people.

5. The ratio of debt to stock should not exceed 4 to 1, although, as noted, some variation on either

side may result from the special facts of a particular case.

6. If possible, the debt should be limited to the amount which informed outsiders would be willing to lend.

7. If possible, stockholders should guarantee a bank loan rather than advance funds themselves. (If a loss results, this method also may give a stockholder an ordinary loss, deductible in full, rather than a capital loss which has only limited deductibility.)

8. If possible, there should be a good business purpose for debt.

Contributed by Committee Member
Benjamin Arac

Activities of Sections and Committees

SECTION OF CORPORATION, BANKING AND BUSINESS LAW

■ The November issue of the *Business Lawyer* contained a complete list of the Division and Committee Chairmen and Committee Members. Also included was a synopsis of the panel discussion on employee stock options as presented at the Annual Meeting of the American Bar Association. This synopsis has been of wide interest to the profession and many favorable responses have been received.

The Committee on Federal Regulation has been in communication with the Chairman of the Securities and Exchange Commission and has already been of assistance in its program of overhauling its practices and regulations. The Committee on Corporate Laws has been over comments and suggestions received relating to its latest edition of the Model Business Corporation Act and has further considered its program for annotating the Act. This has been approved by the American Bar Foundation, although funds have not yet been obtained. The Committee on Noncorporate Business Organizations has undertaken a study of the partnership laws of various states with the intention of formulating a Model Partnership Act. The Committee on State Regulation has been working on a draft of the Uniform Securities Statute. The Division of Bankruptcy has been active and has reported disapproval of four bills introduced by Senator Langer (S. 2560-3) which provide for several new classes of federal officeholders. The Committee on the Proposed Uniform Commercial Code is ever-active with respect to the Code, an issue in so many states this January. The Chairman and various members of the Section have participated in lectures given on the Code under the auspices of the Pennsylvania Bar Association in both Pittsburgh and Philadelphia.

A program has been formulated on small closed corporations for presentation at the Regional Meeting in Atlanta. It is hoped that as many members of the Section as can will attend the Regional Meeting.

SECTION OF CRIMINAL LAW

■ The most important recent event for the Section of Criminal Law is that it has found a new champion for the various legislative proposals relating to organized crime activities, formally approved by the American Bar Association in 1951 and not yet acted upon by Congress. The measures will be pressed by Representative Kenneth B. Keating, of New York, an important Republican member of the House Judiciary Committee.

In an exchange of correspondence with Section Chairman Walter P. Armstrong, Jr., Representative Keating stated:

"I am confident that this subject will not be neglected in the coming session of Congress, and that you will not be in any sense obliged to rely on me alone. But you may certainly count on me to do all I can to help in the development and sponsorship of the program."

Representative Keating has also advised that he will take an active interest in new proposals, such as a suggested expansion of the concept of conspiracy, which are under consideration by the Section, and which hold promise of improving the Federal Criminal Code with respect to the suppression of organized crime activities.

SECTION OF JUDICIAL ADMINISTRATION

■ Justice Laurance M. Hyde, Chairman of the State Committee on Improving Administration of Justice, Supreme Court, Jefferson City, Missouri, reports a meeting of the Committee on January 29, 1954, during the mid-winter session of the Missouri Bar.

Justice Hyde's committee is divided into five subcommittees, as follows:

1. *Expediting Trials and Appeals:* This subcommittee has proposed a rule for the uniform deposit for costs in all circuit courts, among other projects.

2. *Expediting City Trial Dockets:* Three additional circuit judges in Jackson County and two additional

circuit judges in St. Louis County were provided by legislation enacted upon the recommendation of this subcommittee, which is continuing its study of the log jam problem.

3. *Improving Jury Trials:* A Uniform Handbook of Information for jurors has been prepared and a rule for its use proposed by this subcommittee (see the September issue of the *Missouri Bar Journal,* page 199). The subcommittee is also at work on legislation authorizing use of alternate jurors.

4. *Administrative Office for the Courts:* Legislation to establish an administrative office for the courts by amending legislation concerning the executive secretary of the Judicial Conference has been prepared by this subcommittee in co-operation with other groups.

5. *Appellate Court Jurisdiction:* This is a new subcommittee which is studying procedure to effect a speedy method of getting legal questions finally determined by presenting to appellate courts an agreed statement of fact, somewhat as is done in Connecticut.

A plan for a unit of the metropolitan court survey to be conducted in Kansas City, Missouri, under the direction of members of the faculty at the University of Kansas City Law School is in preparation and will be presented to the Council of the Section of Judicial Administration shortly.

SECTION OF ANTITRUST LAW

■ The spring meeting of the Section of Antitrust Law will be held at the Mayflower Hotel in Washington, D. C., on April 2, 1954. For the meeting a symposium has been designed to provide general practitioners with practical advice on how to try antitrust cases. Assistant Attorney General Stanley N. Barnes and Federal Trade Commission Chairman Edward F. Howrey and members of their staffs will discuss the problems and procedures involved in cases within their respective jurisdictions.

Preceding the meeting, there will be a dinner on April 1 which will provide an opportunity for the members of this Section to meet informally the attorneys of the Department of Justice and of the Federal Trade Commission, including those who will be the speakers the following day. Attorney General Herbert Brownell, Jr., is scheduled to address the dinner meeting informally. Any members of the Association who are not members of the Section and wish to attend, may join the Section by writing to the Membership Department of the Association in Chicago. The meeting will occur during cherry blossom time so early reservations are necessary.

SECTION OF ADMINISTRATIVE LAW

■ The Section has recorded with sorrow the death of an old friend and stalwart, Clarence A. Miller. At the time of his death Mr. Miller had been a member of the Council of the Section for more than three years. He was a faithful attendant at all Section and Council meetings for many years, when his duties as Vice President and General Counsel of the American Short Line Railroad Association permitted. His wise counsel and clear grasp of Section business will be sorely missed. Sympathy is extended to Mrs. Miller and to his family.

Considerable Section interest has developed as a result of transmittal to agency heads of Circular No. A-25 from the Bureau of the Budget. Based on authority of Section 5 of the Independent Office Appropriation Act, 1952, it is the purpose of the circular to require these officials to undertake studies or surveys in order to establish fee schedules for services rendered by such agencies. Under the schedules established it is contemplated that federal departments and agencies would recover the aggregate costs incurred in the conduct of licensing, registration and related activities of the agencies. The gist of the matter is that those getting services from the government would be expected to pay fair and equitable charges so as to make the transaction of official business self-sustaining.

There has been some opinion among council members of the Section that the policies involved in this matter constitute a matter of substance and not one of procedure. The majority have felt, however, that the matter is one for examination by the Section either by means of a special committee set up for the purpose or through each of the established committees which deal with particular agencies. The Chairman welcomes the views of anyone who wishes to express them with respect to the handling of this matter.

Negotiations have been under way between Section representatives and members of the Committee on Unauthorized Practice with the result that it is expected that a revised administrative practitioners' bill will be submitted for early introduction in the present session of Congress.

Questionnaires are being circulated by the Hearing Officers' Committee of the President's Conference on Administrative Procedure to agencies and bar associations for the purpose of gathering information to aid the committee in formulating a recommendation respecting the status of hearing officers for consideration by the Conference at its spring session. Section members are reminded that Chairman Robert F. Jones, of the Hearing Officers' Committee of the Section, will be glad to receive an expression of views as to any preferences felt for the following methods of appointing hearing examiners: (a) by Civil Service Commission regulation as now provided, (b) by presidential appointment and Senate confirmation as administrative judges as proposed in S. 1708, (c) by regulation in an Office of Administrative Procedure to be created as recommended by the Attorney General's Committee on Administrative Procedure, or (d) by other means to be specified. Mr. Jones's address is National Press Building, Washington 4, D. C.

SECTION OF INTERNATIONAL AND COMPARATIVE LAW

■ Dr. José Barbosa de Almeida, the President of the Inter-American Bar Association, met with representatives of that Association at the Pan American Union in Washington, D. C., on December 14 to discuss plans for the Eighth Conference to be held in São Paulo, Brazil, March 15 to 22. George Maurice Morris, First Vice Chairman of the Section of International and Comparative Law, presided in his capacity as Chairman of the Executive Committee of the Inter-American Bar Association, and Section Chairman Whitney R. Harris made a statement regarding the participation of members of the Section in the Conference. Included on the agenda of the Conference are reports by Oliver Schroeder, Jr., Chairman of the American Bar Association's Committee on Uniform Laws for the Americas, on the draft uniform law on negotiable instruments, and by William Roy Vallance, Secretary General of the Inter-American Bar Association, on the result of recommendations that American countries adopt the Uniform Rules and Uses on Documentary Letters of Credit. Other topics that have been approved for discussion at the Conference are the juridical status of the continental shelf, problems of the lawyer in a foreign jurisdiction, conflicts of laws regulating bankruptcy, action taken by the Organization of American States to draft an Inter-American Convention on trademarks, trade names, and unfair competition, and liability of air carriers.

COMMITTEE ON INCOME TAX AMENDMENT

■ Hearings on H. J. Res. 103 (which proposes the Reed-Dirksen Amendment endorsed by the American Bar Association) are scheduled to begin before the Judiciary Committee of the House of Representatives in March or April. The resolution fixes a top rate of 25 per cent on income taxes, but gives Congress the power by a three-fourths vote of all its members to fix a top rate in excess of 25 per cent, if such rate does not exceed the lowest rate by more than 15 percentage points. It also surrenders to the states sole power to impose taxes on gifts and inheritances.

The proposed amendment is misunderstood by many. It does not limit in any way the amount of revenue Congress may raise, but merely eliminates from our system of taxation its communistic or socialistic features, namely, (1) the "heavy progressive" income tax, and (2) the confiscatory estate tax, which, if continued indefinitely, will eventually dry up the sources of private capital and destroy the rights of the states.

The amount of revenue derived from the estate and gift taxes is only 1 per cent of the total budget—enough to pay the Government's expenses for about three days.

Only 3 per cent (about $2 billion) of the total federal revenue comes from the individual income tax rates in excess of 37.2 per cent, which is 15 percentage points above the beginning rate of 22.2 per cent under the Revenue Law in force in 1953. This would be the highest top rate that could have been imposed if the amendment had been in effect in 1953 and the beginning rate of tax were 22.2 per cent. At the present rate of spending, this would pay the Government's expenses for about ten days.

The great bulk of the revenue from the individual income tax comes from the taxpayers with the small incomes, for that is where the bulk of the income is. The only possible way to give them relief is either (1) by reducing the need of revenue through cutting expenditures or (2) by increasing revenue through a drastic reduction of the present confiscatory higher bracket rates so as to increase incentive and investment in productive enterprise. This has been the effect of such reduction in the past, and there is no reason to believe that its future effect would not be the same.

The surest means of destroying a people's freedom is through abuse of the taxing power. The only certain way of preventing this is by a constitutional curb on such power. "Government unlimited" is man's greatest enemy.

Nominating Petition

South Dakota

■ The undersigned hereby nominate Roy E. Willy, of Sioux Falls, for the office of State Delegate for and from the State of South Dakota to be elected in 1954 for a three-year term beginning at the adjournment of the 1954 Annual Meeting:

John Theodosen, of Garretson;

Boyd M. Benson, Max Royhl, Ralph Mauch, Leo A. Temmey and Tom H. Luby, of Huron;

Leo D. Heck. Boyd Leedom, Vernon R. Sickel and Karl Goldsmith, of Pierre;

B. O. Stordahl, M. T. Woods, Holton Davenport, Ellsworth E. Evans, Louis R. Hurwitz, Deming Smith, Rex M. Warren, F. G. Warren, John R. McDowell, Enos G. Jones, John S. Murphy and Nils A. Boe, of Sioux Falls;

Alan L. Austin, D. K. Loucks and Ross H. Oviatt, of Watertown.

Practicing lawyer's guide to the current LAW MAGAZINES

Arthur John Keeffe • Editor-in-Charge

ANTITRUST: One of the most delightful pieces I have ever read is "Historic Origins of Antitrust Legislation", by Rush H. Limbaugh, of Cape Girardeau, Missouri, in 18 *Missouri Law Review* 215. Reading the newer antitrust decisions and observing new developments, we forget the past. Not Rush H. Limbaugh. He has read every book and paper with respect to the beginnings of antitrust and the political background of great decisions such as the *Standard Oil* case of 1911. His reading ranges from Blackstone and Lord Bryce to Mr. Dooley and Mark Sullivan, and his relation of the early cases to this background material makes a real contribution. Our profession is greatly in debt to this fine scholar. (Address: Missouri Law Review, Columbia, Missouri; price for a single copy: $1.00.)

Norman M. Gold and Richard P. McGrath, third-year Harvard Law School students, have published in the December, 1953, issue of the *Harvard Law Review* (Vol. 67—No. 2; pages 294-317, single copy, $1.50, Harvard Law Review, Gannett House, Cambridge, Massachusetts), one of the finest law school comments it has ever been my pleasure to read. The piece is entitled "Functional Discounts Under the Robinson-Patman Act: The Standard Oil Litigation" and as the title indicates, it concerns *Standard Oil of Indiana* v. *Federal Trade Commission*, 340 U.S. 231, as modified by the Seventh Circuit on May 19, 1953, C.C.H. Trade Reg. Rep. ¶. 11,603. The writing is outstanding and in every line reveals that these two boys know what they are talking about from first-hand investigation. It seems Mrs. William G. Hibbard of Chicago, Illinois, gave funds to the *Harvard Law Review* that were used by the writers to finance on-the-spot research with respect to the *Standard of Indiana* litigation during the spring, summer and fall of 1953 in Washington, New York, Chicago, and Detroit. For those interested in Robinson-Patman problems, this comment is "must" reading. The result is so good that perhaps other donors will be persuaded to finance for other law review editors similar investigations. This is an excellent precedent. Other law reviews please note what the hated Harvard has done.

One of the world's finest economists is Professor Alfred E. Kahn of Cornell University. I say this with conviction because it was once my great pleasure to teach antitrust with him at Cornell Law School and an inspiration it was. Once during our days together at Cornell, James Blanning, then one of my law students, attacked the *A. and P.* decision of Judges Lindley and Minton, *United States* v. *New York Great Atlantic and Pacific Company*, (67 F. Supp. 626, affirmed 173 F. 2d 79) on the local radio while Professor Kahn and his student, Joel B. Dirham, defended the decision. As I listened to Dirham and Kahn batter Blanning, I realized how I had thrown him to the wolves and I have never been surprised that after graduation from law school, he entered divinity school. In the Fall, 1953, issue of the *Indiana Law Journal* (Vol. 29—No. 1; pages 1-27, single copy, $1.50, Bloomington, Indiana) entitled "Integration and Dissolution of the A. & P. Company" you will find the most interesting discussion of Dirham and Kahn. Neither Blanning nor I believe what these economists say but we not only defend their right to say it; we go further and say you cannot intelligently discuss the *A. and P.* case without hearing their views. The *New York Times* of January 20 reports on the A. & P. consent decree.

Not satisfied with his piece in the *Indiana Law Review*, above, the indefatigable Kahn, who is a member of the anti-trust committee of Attorney General Brownell, of which Stanley Barnes and Oppenheim are cochairmen, has a leading article also in the November, 1953, issue of the *Harvard Law Review* (Vol. 67—No. 1; pages 28-54; price for a single copy: $1.50) entitled, "Standards for Anti-Trust Policy". It is the usual splendid Kahn job, and we lawyers need to read it. I must confess that a great deal of it is over my head, and, if I know our professsion, my fellow lawyers will enjoy it about as much as castor oil. We don't like what's good for us.

CIVIL RIGHTS:—Professor Ralph F. Bischoff of New York University's School of Law has written an interesting article under the title "Minority Rights and Majority Rule", which appeared in the June, 1953, issue of the *Virginia Law Review* (Vol. 39—No. 5). His general thesis is that in a period of stress and strain, when it is so difficult to synthesize national security with individual freedom, the tendency is to rely heavily on the courts as protectors of our civil rights. Therefore, it becomes particularly important to note the attitude of the judiciary, particularly the Supreme Court, toward other elements and procedures in our democracy, such as majority rule. To what degree, for example, does the Court show a consciousness that civil rights legislation may be more democratic and effective than judicial declarations on constitutionality? Is there a danger that decisions in favor of a minority might curtail the rights of individual members of the major-

ity? This reminder is well illustrated by *Dorsey* v. *Stuyvesant Town* and by the recent cases on released time. (Address: Virginia Law Review, Charlottesville, Virginia; price for a single copy: $1.25.)

CONSTITUTIONAL LAW—All the leading articles in the Autumn, 1953, issue of the *University of Chicago Law Review* (Vol. 21—No. 1) are devoted to Professor William W. Crosskey's book, *Politics and the Constitution*, a magnificent tribute by his colleagues. To quote Abe Krash, of the District of Columbia Bar, in that issue:

> "This is an extraordinary book, boldly original and revolutionary in its implications. If Crosskey is right—and he adduces an enormous mass of supporting evidence—the historical meaning of the Constitution is generally unknown and much that passes for constitutional law is in fact unconstitutional; *Politics and the Constitution* is moreover not merely a treatise on law; it is an absorbing account of history and government by a perceptive student of human affairs."

Charles E. Clark, Charles Fairman and Walton H. Hamilton contribute the other pieces. Judge Clark's contribution is entitled "Professor Crosskey and the Brooding Omnipresence of Erie-Tompkins" and discusses the new evidence which Crosskey assembles in this book to uphold Story's decision in *Swift* v. *Tyson*, disproving the research of Warren entitled "New Light on the History of the Federal Judiciary Act of 1789", published in 37 *Harvard Law Review* 49 in 1923 and cited by Brandeis in the *Erie* v. *Tompkins* opinion. Concerning Crosskey, whom Clark knew so well at Yale Law School, he has this to say:

> "Professor Crosskey surely proves enough to require a fresh approach in our constitutional thinking. . . . But Jefferson is still a mighty force; condemnation of his actions even to the point of rehabilitating the Sedition Act was hardly necessary. It is likely to stimulate reactions such as those of one professorial reviewer who betrayed an emotional investment in the constitutional status quo curious to behold; he even suggested the unworthiness of a university press which would stoop to publish this original new work! (See Swisher, 36 Saturday Review 33). In truth the author's combativeness here may appear surprising. . . . But the author does carry it further than is customary. He has both Jefferson and Madison as early Nationalists, who departed from the faith for reasons political, while Marshall is shown fighting merely a rear guard and constantly losing struggle, full of compromises, turns and twists, to preserve a semblance of strength to the central government. So personal does he make this struggle and the motivations of the distinguished protagonists that many are likely to be turned away from his important thesis. Having known the author in all his forthrightness and obduracy from his student days, I can, I think, understand how his own conception of truth would not permit him to yield even the proverbial ell to the humanness of politicians. If the great X was that kind of petty heel, it must be so stated. Moreover, such a sense of personal involvement in long ago battles was doubtless necessary to sustain research so exhaustive for so many years with so little of definite encouragement from any source except one's own inner strength of character."

This is high praise, indeed, from a former professor to a former student. Walton H. Hamilton entitles his piece "The Constitution—Apropos of Crosskey" and states:

> "It is, I think, my differences with Crosskey which make me so conscious of how superb his contribution is."

Quite contrary to Krash, Clark and Hamilton, Charles Fairman in a piece entitled "The Supreme Court and the Constitutional Limitations on State Governmental Authority" accuses Crosskey of both prejudice and suppression. He says Crosskey "is not candid and objective; on the contrary, results thus arrived at should be viewed with the greatest skepticism and reserve!" In particular Fairman takes violent exception to Crosskey's "strictures of the long line of Justices" of the Supreme Court. Crosskey in his book dismisses as irrelevant the research that Fairman did with respect to the Fourteenth Amendment, published in the *Stanford Law Review* a year or so ago.

This is without doubt the most controversial law book in many a moon and whether you agree or disagree every lawyer should read it. (For the above four articles about the book, address: Chicago Law Review, 5750 Ellis Avenue, Chicago 37, Illinois; price for a single copy: $1.75.)

BAR ACTIVITIES

Paul B. DeWitt · Editor-in-Charge

■ In his annual report Hicks Epton, retiring President of the Oklahoma Bar Association, described a number of activities which that Association has undertaken during the past year. One of the most interesting is the Association's campaign to raise funds to build a model courtroom at the Oklahoma University Law School. The courtroom, when completed, will be used for practical trial and appellate instruction. For several years the law school has had an extensive program of having actual trials and demonstrations in the courtroom of the school. Federal district judges, with the consent of the parties, have held actual pretrial conferences at the school. The court clerk and reporter move to Norman, and the judges stop the proceedings when necessary to explain to the students the reasons for certain proceedings and techniques. Following the same plan, the Industrial Commission has held actual hearings at the law school.

Another feature of the Association's program is a weekly radio report to the public on what the Association and its committees are doing by way of public service to the state. The broadcasts are made by Kenneth Harris, the Executive Secretary of the Association.

In co-operation with the Bureau of Business Research of Oklahoma University, the Association has conducted a survey of the legal profession in the state which will shortly be published.

The Association continues to sponsor "Law Week". During this week speeches are made by lawyers to church, school and civic groups, essay and speech contests are sponsored by local bar associations, and school children are brought to the courthouse where the functions of the court and county offices are explained to them. The Association's *Bar Journal* includes opinions of the Supreme Court at a saving to members of $18 a year.

■ In November, the Southwestern Legal Foundation and the Southern Methodist University Law School held an institute on labor law and in December an institute on personal injury litigation. In January the Foundation held its fifth Annual Institute on the law of oil and gas taxation. The fourth Annual Lawyers' Week in April will include institutes on trial strategy, financing through issuance of securities, and discussion of "Law in Society".

■ The Alameda County (California) Bar Association, which was awarded Honorable Mention for outstanding and constructive work by the American Bar Association in 1949, has published a history of the Association. The volume contains photographs and biographies of over four hundred members of the Association and a history of the courts and the Association from 1850 to 1953. The editor of the volume is C. W. Taylor, Jr.

■ The College of Law of the University of Illinois, in co-operation with the Division of University Extension, conducted a short course for practicing lawyers and judges on "Divorce and Property Settlements in Illinois". The course lasted for two days and is the seventeenth in the series of institutes, conferences and short courses sponsored by the law school.

■ The moot court team from the University of Nebraska Law College won the championship of the fourth annual national moot court competition sponsored by the Young Lawyers Committee, John Roberts Miller, Chairman, of The Association of the Bar of the City of New York. Nebraska defeated the team from Georgetown University Law Department in the final argument. The court for the final argument consisted of Tom C. Clark, Associate Justice of the Supreme Court of the United States; Carroll C. Hincks, Judge of the United States Court of Appeals for the Second Circuit; Charles E. Wyzanski, Jr., Judge of the United States District Court, District of Massachusetts; David W. Peck, Presiding Justice of the Appellate Division, First Department; John W. Davis; Arthur H. Dean, Special Envoy to Korea; and Bethuel M. Webster, President of the Association.

The fictitious case which was argued involved the contractual rights of a professor of political science who claimed his constitutional privilege to refuse to answer certain questions put to him by a congressional committee investigating Communist infiltration into education. The decision, of course, was not on the merits of the case but on the forensic abilities of the students. On the winning Nebraska team were William H. Grant, Ronald W. Hunter, and Eleanor L. Knoll. The team won for its school possession of a silver cup named in honor of Judge John C. Knox and the William J. Donovan Prize of $500. The University of Chicago Law School team was judged to have submitted the best brief, entitling Chicago to the Harrison Tweed Bowl. On the Chicago team were Marvin E. Stender, Harold A. Ward III and Paul N. Wenger, Jr. Eleanor L. Knoll of the Nebraska team was awarded the prize for the best individual argument before the court.

The sixteen teams that competed for honors at the House of The Association of the Bar had earned their right to participate in the New York arguments by winning competitions held among seventy law school teams from all over the United States. The local competitions which were held in November took place in Boston, Ithaca, New York, Philadelphia, Washington, Atlanta, Detroit, Chicago, St. Louis, Salt Lake City, Aus-

tin, Texas and Stamford, Connecticut. Georgetown University Law Department won previous national competitions in 1952 and 1950. The University of Arizona College of Law won the national competition in 1951.

■ The Young Lawyers Section of the New York State Bar Association held a regional meeting at Syracuse in November, devoting its program to a practical panel on trial procedure.

At the morning session Professor William J. Lloyd, of Syracuse, spoke on the topic "Clients with a Legislative Problem" and Supreme Court Justice William E. McClusky, of Syracuse, had as his topic "Pretrialing a Case".

Robert W. Dettor, of Syracuse, Assistant Secretary of the Section, presided at the luncheon at the Hotel Syracuse. He introduced Chairman Jay Cox O'Brien, of Albany, and Robert Bentley, of Arcade, the Section's Secretary, and Neal P. McCurn, Chairman of the Committee on Arrangements for the meeting.

The following Association officers spoke briefly at the luncheon: Franklin R. Brown, President; George R. Fearon, Vice President; and William F. FitzPatrick, Executive Committee member.

State Senator John H. Hughes, of Syracuse, was the luncheon speaker and he touched upon his legislative experience and the importance of young lawyers taking an active part in community and political affairs. He outlined briefly the proposed studies of The Temporary Commission on the Courts, of which he is a member, and urged the younger members of the Bar to inform themselves upon the problems being studied and solicited their suggestions on ways and means of bettering the present system of administration of justice in the state.

At the afternoon session Victor Levine, formerly of the Syracuse Law School faculty, discussed "The Argument of an Appeal" and Paul R. Shanahan, of Syracuse, spoke on "The Presentation of the Criminal Case".

■ The Nebraska State Bar Association held its eleventh annual Institute on federal tax law during the week of December 14. Four hundred and sixty-seven lawyers, representing 130 towns throughout Nebraska, registered for the series of Institutes. The two-day programs covered subjects dealing with income tax problems of corporations and trusts and estates, federal tax liens, and recent developments in tax problems of farmers, feeders and ranchers. These programs were presented at Scott's Bluff, Kearney and Omaha.

■ A new organization, which stems from the National Conference of Bar Association Presidents, consisting of all Presidents, Vice Presidents and past Presidents of local or district bar associations, has recently been formed in Iowa. At the formal organization meeting held on December 2 the following officers were elected: Craig Kennedy, Waterloo, *President;* J. O. Watson, Jr., Indianola, *Vice President;* Marlys W. Koopman, Sibly, *Secretary;* and Vincent Johnson, Montezuma, *Treasurer.*

The objects of the Iowa Conference of Bar Association Presidents are:

1. To develop a cordial relationship and spirit of unity and common understanding between local, district, state and American bar associations for the benefit of the public and the profession.

2. To promote the objects and purposes of the members' respective local and district bar associations.

3. To stimulate the work of local and district bar associations generally.

4. To secure a closer co-ordination of the bar activities of the local and district bar associations of the state of Iowa and the Iowa State Bar Association and the American Bar Association.

5. To provide a forum for the mutual exchange of ideas originating either in the local or district bar associations or the Iowa State Bar Association to the benefit of the public and the profession.

■ In a recent letter to the President of the Ohio State Bar Association the Cuyahoga County Bar Association expressed its objections to the proposed integration of the legal profession in Ohio. Franklin A. Polk, Chairman, Committee on Integrated Bar Proposals, wrote that the Board of Trustees of the Cuyahoga Association opposes "any proposal burdening the Supreme Court of Ohio with the establishment of a system of discipline of the attorneys of this state".

■ The Brooklyn Bar Association at its 65th Annual Dinner entertained the entire Bench of the Court of Appeals of the State of New York. Speakers included Chief Judge Edmund H. Lewis and Associate Judge Albert Conway. Over seven hundred members and their guests attended.

■ The only national society devoted exclusively to matters of copyright is The Copyright Society of the U.S.A. Since the United States became a signatory with thirty-nine other nations to the Universal Copyright Convention at Geneva, which has been transmitted to the Senate for ratification, increased interest has been manifested in the field of intellectual properties, literature, drama, motion pictures, radio and recordings of all types. The Society is continuing the publication of the Copyright Bibliographical Bulletin previously issued by the U. S. Copyright Office. The officers, all of whom are actively engaged in the copyright field in various parts of the country, are Samuel W. Tannenbaum, *President;* Louis E. Swarts, Joseph A. McDonald, *Vice Presidents;* Theodore R. Kupferman, *Secretary;* Charles B. Seton, *Assistant Secretary;* Harry G. Henn, *Treasurer;* and Paul J. Sherman, *Assistant Treasurer.*

OUR YOUNGER LAWYERS

Thomas G. Meeker, Secretary and Editor-in-Charge, New Haven, Conn.

March Is Membership Month Throughout the Conference

■ One of the principal functions of the Junior Bar Conference is that of obtaining new members for the American Bar Association from the ranks of the younger lawyers. Each member of this Conference has now received a communication from Chairman C. Baxter Jones, Jr., advising him that March has been designated as "membership month". The purpose of this special drive, which asks each member of our Conference to obtain one additional member for the Association, is to broaden the base of our membership solicitation and thus reach many of those whom we have never approached in our annual state-wide drives. Each member of the Conference has received an application blank for use in obtaining his new member. *Have you returned a signed application blank and thus fulfilled your quota for "Membership Month"?* If not, please do so now and be sure to mail the completed application to Headquarters before March 31.

Thomas E. Taulbee, Chairman of the Membership Committee, is making plans to have a membership booth manned by members of the Conference at each annual meeting of a state bar association through 1954. A model for this display will be unveiled by Chairman Jones at the Atlanta Regional Meeting, March 3 through 5, 1954. In addition to posters setting forth the advantages of membership in the American Bar Association, each booth will be equipped with a complete set of Section publications and other Association and JBC publications.

Circuit Activities

Council members from certain of our circuits already have held meetings of the state chairmen within their respective circuits. Alvin Rubin, Council Member at large for the Fifth and Eighth Circuits for 1954, reports that a meeting was held in Dallas on November 14, at the Adolphus Hotel. Present at the meeting were Jack Deacon, Arkansas Junior Bar Conference President, and Edward Lester and Philip Carroll from the Arkansas Junior Bar; Edward Winn, President of the Junior Bar Section of the State Bar of Texas, together with Charles O. Shields from the Texas Junior Bar and Robert G. Storey, Jr., Council Member at Large from the Sixth and Eighth Circuits for the years 1952 and 1953, and 1954 Professional Director, and the President of the Louisiana Junior Bar Section, B. C. Bennett, together with the following members of that section: Paul Tate, Edward D. Findley, John G. W. Robertson, and Jack Weinman, Chairman of the Inter-American Bar Committee of the Junior Bar Conference for 1954. Reports were received from the president of each junior bar section and Mr. Storey explained the organization of the Junior Bar Conference. Mr. Weinman reported on the work of the Inter-American Bar Committee. It was agreed that the states in the fifth and eighth circuits would concentrate on an ABA membership drive. There were social activities on Friday and Saturday evenings during the course of the circuit meeting.

On December 7 the Council Member from the Sixth Circuit, Rosemary Scott, called a meeting of the State Chairmen from the states within that circuit and on January 23 Council Member Frank Hinckley from the First Circuit presided at a meeting of the State Chairmen in his circuit with certain state chairmen from the Second Circuit among those present.

The Latest JBC Publication

Your Secretary is now editing and publishing a *Junior Bar Conference*

Board of Directors of Junior Bar Conference at quarterly meeting in Washington, D. C., December 5 and 6. Left to right: Stanley B. Balbach, Urbana, Illinois, Vice Chairman; Frank E. Horka, Baltimore, Maryland, Director; Thomas G. Meeker, New Haven, Connecticut, Secretary; C. Baxter Jones, Jr., Atlanta, Georgia, Chairman; Robert G. Storey, Jr., Dallas, Texas, Director; Rosemary Scott, Grand Rapids, Michigan, Director, and S. Michael Schatz, Hartford, Connecticut, Director.

Newsletter which is distributed currently to all officials of the Conference. The purpose of this newsletter is to help each officer, director, committee chairman and vice chairman to keep current with the various activities of the different committees of our Conference. The first issue of the publication was published on November 30 and it will be published monthly during the year 1954.

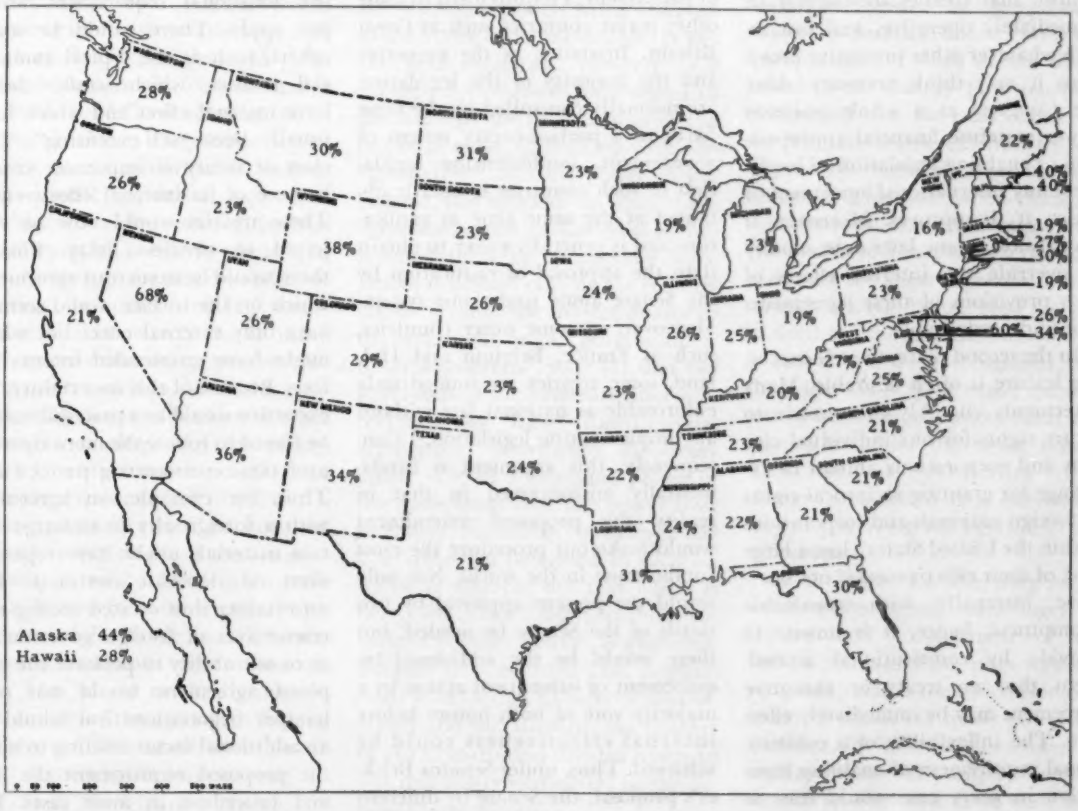
Lawyer Placement Service Under Consideration

John Nagle, Chairman of the Conference Committee on Lawyer Placement, is currently considering the possibilities of establishing a Lawyer Placement Bureau and index at Headquarters in Chicago. Anyone having any suggestions on such a bureau please write directly to Chairman Nagle, Putnam Building, Davenport, Iowa.

American Bar Association Membership

How Can You Improve Your State's Standing?

(Figures below indicate percentage of total lawyers in each state who are American Bar Association members.)



Headquarters is anxious to supply you with materials *persuasively demonstrating the advantages of American Bar Association membership.* Write 1140 N. Dearborn, Chicago 10, Illinois.

By spending a few minutes on the telephone you can invite nonmember friends (nonmembers do not have the distinguishing triangle beside their name in *Martindale-Hubbell Law Directory*) and *change these percentages.*

There's Plenty of Room for Improvement —

Successive issues of the *Journal* will record each state's progress.

The Case Against Amendment

(Continued from page 206)

feature of our constitutional system.

There are several answers to this contention. In the first place, whenever immediate effectiveness would be undesirable, it can be easily prevented. Any agreement may, by its very terms, be made "non-self-executing". Adequate protection is afforded under present constitutional provisions through the terms of the agreement itself or by the terms of its ratification. The Senate can, as a condition of approval of ratification, require that treaties should *not* be immediately operative, and can attach whatever other protective provisions it may think necessary. Also, the Congress as a whole possesses power to refuse financial appropriation or enabling legislation to implement any international agreement of which it disapproves. Moreover, it may always, at any later date, modify or override the internal effects of such provisions of these agreements as it finds undesirable.

In the second place, the self-executing feature is often desirable. Many agreements (notably those made to secure rights for our individual citizens and corporations abroad in exchange for granting reciprocal rights to foreign nationals and corporations within the United States) lose a large part of their effectiveness if not operative internally with reasonable promptness; hence, it is unwise to provide by constitutional amendment that *no* treaty or executive agreement may be immediately effective. The inflexibility of a constitutional requirement of enabling legislation in *every* case would lead to endless delay even with respect to the most typical and noncontroversial provisions of commercial treaties.

2. The proponents make the further claim that unless their proposal is adopted the United States will not be on equal bargaining terms with other countries.

This contention involves a fundamental misconception of our own procedure as well as a misleading comparison with other governmental systems. Since, for reasons already indicated, any treaty can be made non-self-executing, this alleged disparity can be easily prevented whenever desirable by a provision postponing the internal effectiveness until the other signatories have legislated (such a provision is frequently found in treaties) or the President can postpone his proclamation to achieve the same effect. Furthermore, the two-thirds vote of the Senate required prior to ratification of treaties in the United States is just as much a legislative act as is the subsequent implementation of treaties by a majority of parliament, a requirement in some other major countries such as Great Britain. Inasmuch as the executive and the majority of the legislature are normally controlled by the same party in a parliamentary system of government, implementing legislation in such countries is usually obtained at the same time as ratification and is generally easier to obtain than the approval of ratification by the Senate alone under our system. Moreover, in some other countries, such as France, Belgium and Holland, some treaties are immediately enforceable as national law without any implementing legislation.[11] Consequently, this argument is fundamentally misconceived in that in reality the proposed amendment would make our procedure the most cumbersome in the world. Not only would the present approval by two thirds of the Senate be needed, but there would be the additional requirement of subsequent action by a majority vote of both houses before internal effectiveness could be achieved. Thus, under Senator Bricker's proposal, the Senate by different majorities would have to pass twice on the same treaty. Furthermore, the House of Representatives would be directly associated as a constitutional requirement for the first time in the process of initially making a treaty effective. Such a participation by the House was considered and rejected by the framers of our Constitution as unwise.

3. The proponents, faced with the argument that the amendment would make our treaty-process extremely cumbersome, argue that the amendment does not change our treaty method in its *international* aspects. They claim that only our own internal procedures will be changed by their proposal.

This argument is essentially a formal one and fails to meet the objections based on the practical effects of the proposed requirement on the ability of our government to conclude expeditiously necessary and desirable agreements. There would be, of course, some agreements which would have no internal effects and so the additional requirement would not apply. There would be many others, such as the typical commercial treaties, which would clearly have internal effect and which have usually been "self-executing". This class of treaty is important chiefly because of its internal effectiveness. These treaties would now be subjected to needless delay. Finally, there would be numerous agreements which on the surface would seem to have only external effect but which might have unintended internal effects. Because of this uncertainty, the executive would as a practical matter be forced to follow the more rigorous and time-consuming procedure. Thus, for example, an agreement with a foreign ally to embargo certain materials might have repercussions on domestic contracts. The uncertainty thus created among representatives of foreign governments as to our ability to perform the proposed agreement would not only hamper negotiations but would be an additional factor tending to make the proposed requirement the normal procedure in most cases. For these reasons, it would seem apparent that the proposal would make much more difficult the adoption of many typical and desirable agreements.

Conclusion as to Self-Executing Treaties

It is then our view that this part of Section 2 of the proposed amend-

11. See Preuss, "On Amending the Treaty-Making Power: A Comparative Study of the Problem of Self-Executing Treaties", 51 Mich. L. Rev. 1117 (1953).

ment is both unnecessary and undesirable. It is unnecessary because existing procedures can bring about the proposed result whenever it is appropriate in any particular agreement. It is undesirable because it is often in our interest that agreements should become effective immediately without further legislation. The proposal to require approval by the House of Representatives in every case was considered and rejected overwhelmingly by the framers of our Constitution. In fact, the framers inserted the supremacy clause in the Constitution so that there would be no doubt that treaties would supersede inconsistent state law. This was a result of their practical experience with state recalcitrance under the Articles of Confederation. If, as suggested above, "legislation" may include state legislation as well as congressional legislation, not only would this create further difficulties of interpretation but it would add even further to the unworkability of the suggested procedure. It is undesirable also because it would make our agreement-making process the most cumbersome in the world, rather than equate it with those of other countries, as alleged by the proponents. It would mean in practice that after the President had negotiated a treaty and ratification had been approved by two thirds of the Senators present, it would have to go back again in most cases for approval by a majority of the House and the Senate before it could have effect as internal law. This would needlessly complicate and delay the agreement-making process at a time when world conditions require speed and certainty.

B. *State Participation Proposal*

The second issue presented by Section 2 concerns what has come to be referred to as the "which clause". It is whether the Constitution should be amended so as to limit Congress' power to implement treaties to those delegated powers which Congress possesses in the absence of a treaty.

The basic argument of the proponents is that the "which clause" is necessary to preserve our federal form of government. This contention is advanced in different aspects.

1. The first is that all powers other than the treaty power are delegated and that the existing treaty power therefore is inconsistent with a federal-state division of power.

The difficulty with this argument is that it misconceives the nature of a federal form of government so far as international affairs are concerned. It is a corollary of the federal character of our government that Congress possesses only those powers in the field of domestic affairs which are delegated to it by the Constitution, all other such powers being reserved to the states or to the people. It has also been recognized, however, as a consequence of the express denial to the states by the Constitution of the power to make agreements with foreign nations, that the power of the Federal Government to make such agreements, and of Congress to implement them by appropriate legislation, is limited only by the requirements (1) that the subject matter of the agreement be of "genuine international concern", and (2) that the provisions of the agreement not contravene any basic constitutional guarantees. Nevertheless, the treaty power is itself a delegated power in the same sense that the power over interstate commerce is delegated.[12] The quantum delegated in each instance is different but that which is delegated is not subject to the reservations in the Tenth Amendment. Because it is essential that negotiations with foreign nations be concentrated and not divided, the framers of our Constitution decided wisely to put this power exclusively in the national government.

The effect of the proposed "which clause" would be to reverse this decision and require a determination, with respect to each agreement, whether the Federal Government or the states had the power to implement a particular provision. While this determination in the first instance would presumably be made by the federal authorities, it would require eventually a determination by the Supreme Court as to where the line should be drawn. This would needlessly confuse and weaken our power to make agreements. The danger and impracticability of such a proposal should be self-evident.

2. The second form of the contention is that matters properly the concern of the several states will be taken over by the Federal Government through the use of the treaty power.

This contention, similar to the prior contention, is also based on a misunderstanding of the federal system in foreign affairs. It also confuses the division of federal-state powers in domestic matters with the question of the scope of the treaty power of the nation. It is generally understood that the treaty power of the United States extends to any matter of "genuine international concern". Therefore when changing international conditions make matters that have hitherto been regarded as outside the scope of permissible international regulation, now in fact in need of international adjustment, it has always been recognized that these matters may be made the subject of international negotiation and regulation under the treaty power. This method of dealing with changed conditions is a convenient way of providing for necessary commitments.

In the past, for the purpose of securing reciprocal advantages to citizens and corporations of the United States and for other national purposes, such as the conclusion of a treaty of peace, the treaty power has traditionally been thus extended into many areas that might otherwise have been regarded as of state concern only. Illustrations are questions of local taxation, the privilege of conducting certain businesses, the possession and distribution of property, the hunting of migratory game birds, and various other matters which in the absence of treaty are customarily considered to be of state concern and not ordinarily subject

12. See *United States* v. *Darby*, 312 U. S. 100 (1941).

to international regulation.[13] The value and convenience of the existing method for negotiation of these reciprocal treaties should be especially emphasized. Our citizens and corporations are often deeply interested in securing such guarantees abroad, whereas Haiti, for example, would have normally nowhere near as great an interest in securing such advantages for its citizens and corporations.

Under the proposed "which clause", the necessity for securing state action in many of these matters would make the negotiation of such traditional agreements extremely difficult, if not impossible. If, for example, one or several important states refused to act, the expected value of the agreement to the foreign country concerned would be gravely impaired. The adoption of the "which clause" in this area would therefore be clearly harmful to our interests.

3. The proponents, faced with this charge that their amendment would prevent in practice the negotiation of many useful treaties, such as those just mentioned, argue that existing broad construction of such federal powers as that over commerce would be adequate to sustain the typical commercial treaty under federal power without requiring action by the states under the "which clause".

The basic answer to this argument is that there is a substantial difference of opinion as to whether the commerce clause could be properly construed to justify treaties affecting local taxation, inheritance of property, access to state courts or other similar matters normally subject to state law in the absence of treaty. Moreover, if it were so broadened by construction, it would expand federal power in nontreaty matters. This unintended result would be undesirable. Furthermore, the additional uncertainties created by the proposed limitation as to where this power lies would be, for reasons previously stated, a further obstacle to the prompt and effective negotiation of such treaties.

Conclusion on the State-Participation Proposal

This part of Section 2 of the proposed amendment is undesirable for the reasons given. It would take us back essentially to the procedures prevailing under the Articles of Confederation. In its actual operation, it might prevent our entering into many desirable treaties, such as commercial treaties. It would generate needless and delaying litigation to determine the proper division of power between the federal and state governments, and this new uncertainty would deprive the nation of the effective power to make agreements which almost all other nations possess. The provisions as they are now embodied in the Constitution are necessary if our government is to function efficiently in its relations with other countries. Adoption of the proposed "which clause" would be a disaster; it would seriously cripple our ability to make agreements necessary for survival in a dangerous world.

Section 3—Issues and Arguments

Section 3 of the proposed amendment reads as follows:

> Congress shall have power to regulate all executive and other agreements with any foreign power or international organization. All such agreements shall be subject to the limitations imposed on treaties by this article.

Before discussing the issues raised by Section 3, the nature and history of executive agreements, as distinguished from treaties, will be briefly noted. In both cases the actual conduct of negotiations and the ultimate decision whether or not to agree to the final document rests with the President. They differ, however, in that treaties also require the approval of two thirds of the Senators present before the adherence of the United States to the agreement can become effective. Executive agreements require no such approval, although in practice the great majority of such agreements are either authorized in advance or ratified later by the Congress as a whole. (In this event they should more properly be called "congressional-executive agreements").

History has repeatedly demonstrated the necessity, in the interests both of flexibility and of speed, of concluding agreements other than treaties: in the period of 1789-1939 the United States made nearly 2000 international agreements, of which only approximately 800 were formal treaties. As of January 20, 1953, according to Annex D of a State Department Statement submitted to the Senate Judiciary Committee, there have been, since 1928, 1527 agreements other than treaties, and 299 treaties. While these figures overlap, they serve to indicate the current ratio. Of course, many of the agreements are insignificant in comparison with the typical treaty, so that a purely numerical comparison is somewhat misleading. In many cases Congress actually does not have sufficient time to consider these necessary executive agreements. We give two examples. As recorded in the same Annex D referred to, there have been 145 Economic and Technical Cooperation Agreements entered into pursuant to the authority of the Economic Cooperation Act of 1948, and 114 subsidiary agreements entered into under the basic authority of the International Civil Aviation Convention and of congressional legislation. Once the Senate or the Congress has fixed the basic policy, detailed consideration of each subsidiary agreement would be both needlessly time-consuming and inefficient.

Apart from particular authorization from the Congress, the President's powers to make "executive" agreements arise from three principal sources: his own powers as the "Chief Executive", the "Commander in Chief", and the "organ for for-

13. In his address before the American Bar Association in Boston, August 26, 1953, Secretary of State Dulles stated, "After it convened in January, 1953, the Senate approved twenty-three treaties, twelve of which, our legal advisers say, would be unconstitutional if the proposed amendment had been in effect, because they deal with matters of state jurisdiction, such as negotiable instrument laws, local licensing laws, etc." Dulles, 39 A.B.A.J. 1063 at 1064 (1953). See also, Chafee, "Amending the Constitution to Cripple Treaties", 12 *La. L. Rev.* 345, 359-368 (1952).

eign affairs", implied from his power to send and receive diplomatic officers. The latter two, especially, are the main source of this independent authority. Authorizations from the Congress cause no special concern and, though the President's own powers must, in the interests of the nation's safety in a world of continual crisis, be broadly construed, they are obviously subject to severe limits. Thus, the Supreme Court may review the exercise of these powers to determine whether any fundamental constitutional guarantees have been violated,[14] and the Congress may, as in the case of a treaty, immediately supersede the internal effects of such agreements by appropriate enactment.[15] These would clearly seem to be sufficient safeguards to prevent abuse of this necessary presidential authority in foreign affairs.

Section 3, like Section 2, presents two distinct issues that require separate discussion. The first sentence raises the issue of whether "Congress" should control the use of executive agreements and treaties as well as any "other agreement". The second sentence seeks to limit executive and other agreements in the same ways that Sections 1 and 2 limit the treaty power. It should also be noted that Section 3 is not restricted to the internal effects of such agreements but asserts power to control the international consequences as well.

The first sentence of Section 3 presents the issue whether the Constitution should be amended to give Congress the power to control the executive's right to make treaties and other agreements. Put in other terms, should the present balance of powers in the Federal Constitution be radically changed to increase congressional control over foreign affairs? The real argument of the proponents is that congressional rather than executive control of agreements is preferable to any independent executive authority in foreign affairs.

This proposal strikes at the separation of powers provided by the framers. It would shift drastically the control of day-to-day routine arrangements in foreign affairs from the President to Congress. One of the basic premises of the framers was the desirability of establishing a government of three divisions—executive, legislative and judicial—possessing separate and balanced powers. In the field of foreign affairs, this balancing of powers between the executive and the legislative departments of the government is evidenced by the existence of several methods for the making of international agreements: (a) treaties, which must be approved by two thirds of the Senators present; (b) congressional-executive agreements, which are authorized or ratified by Congress and (c) presidential agreements, which may be concluded without the necessity of congressional approval. A distinction has long been normally recognized in practice between treaties and presidential agreements. The former deal typically with the more serious issues of basic policy; the latter deal usually with more detailed problems of an administrative nature except in unusual emergencies such as the Berlin air lift. Although it is not difficult to understand the broad distinction, it is considerably more difficult to define the distinction in terms that will not seriously hamper the necessary flexibility of the executive in emergencies. The proposed amendment has abandoned any effort to draw the distinction. Its enactment would serve no constructive purpose and would only succeed in weakening our power in foreign affairs by asserting abstractly the principle of congressional supremacy. It would be wiser and more in accord with our traditions to have the dividing line continue to be drawn from experience in practice through co-operation of all branches of government.

This sentence of Section 3 is both unnecessary and undesirable. Existing control by Congress of executive and other agreements is adequate to prevent abuse. Adoption of the proposal would upset the separation of powers and deprive the nation of needed speed and flexibility in agreement-making. To deprive the executive of any independence in foreign affairs would be disastrous.

The second sentence of Section 3 raises the issue whether the power to enter into executive agreements should be restricted in the same manner as Sections 1 and 2 limit the treaty power. Proponents of the amendment contend that the proposed limits on treaty-making should also apply to the making of executive agreements.

The objections which have been mentioned previously with respect to the proposed limitations upon the treaty-making power, apply with equal force in the case of executive agreements. As already noted, the Supreme Court has made it clear that fundamental constitutional rights will be protected with respect to executive agreements no less than in the case of treaties, and, as with treaties, Congress can supersede the internal effect of any executive agreement which it finds objectionable.

As a practical matter, the requirements of Section 2 of implementing legislation for internal effect, when applied to executive agreements by the second sentence of Section 3 would seriously impede, if not prevent, the adoption of a wide variety of useful arrangements now handled by executive agreements.[16] Section 3, in the case of reciprocal trade agreements, for example, would require not only initial authorization by Congress of the program as a whole as is the case today, but also each individual agreement reached under that program would then have to be approved by Congress, unless the Congress were to authorize the precise terms of each individual agreement in advance. Were Congress not to do this, each final agreement would be subjected to the evils of congressional log-rolling and the policy involved in the program would be seriously jeopardized. It

14. *United States* v. *Belmont*, 301 U. S. 324 (1937) and *United States* v. *Pink*, 315 U. S. 203 (1942), show the Supreme Court will make this inquiry.

15. See note 5, *supra*.

16. See, for concrete examples, footnote references 22 and 23 in Dillard, "Treaty Making Power", 26 So. *Calif. L. Rev.* 373 at 381-2 (1953).

would be time-consuming and absurd for Congress to pass on every detailed arrangement under the Mutual Security program or for the exchange of government publications or on other technical matters concluded under the general authorization and directions given by Congress to enter into agreements of a particular type.

The second sentence of Section 3 is unnecessary for the same reasons that were given for opposing the identical limits proposed for the treaty-making process. Furthermore, in practical operation, the proposed restrictions would make executive-agreement-making even more cumbersome than the proposed treaty method. It might well utterly destroy the usefulness of many traditional types of executive agreements, and thereby cripple our power to negotiate effectively with foreign nations.

III

General Conclusions on the Bricker Amendment

In arriving at any final evaluation of the wisdom of adopting this proposed amendment, it should be borne constantly in mind that it is the United States Constitution with which we are dealing—what William Gladstone once called "the most wonderful work ever struck off at a given time by the brain and purpose of man". We must recall with admiration the competence and foresight of those men of stature who framed it, and we must realize without question that those who would now change so great a document have a burden that is indeed heavy to convince us today that they have devised a wiser way of dealing with international agreements than did the framers themselves. Moreover, we must challenge those who advocate so drastic a change to point out to us what dangers our country has in fact suffered over the past 166 years from the exercise of these powers as thus originally conceived. They have not shown any such losses. The original constitutional arrangements have indeed served us well.

But not only have the proponents totally failed to support this burden. It is our considered opinion that the proposed amendment is both unnecessary and dangerous. It is unnecessary because the process by which international agreements become effective in this country is presently subject to adequate controls, and its operation in practice has not shown any threat to our form of government or our liberties. It is dangerous because it would make the nation practically impotent in agreement-making at the very time when it most needs the utmost flexibility and power in the use of this vital alternative and supplement to military means. This proposal represents an effort to revert to isolationism and to a procedure for state participation in agreement-making that was decisively rejected by the framers of our Constitution in the light of their own experience. The threats and tensions of the day, the trend toward increased participation and co-operation in international affairs which is essential to world peace and vital to our own security make it vital that our traditional powers to make international agreements remain unimpaired. Consequently, this attempt to restrict the freedom and power of the United States in the conduct of its foreign affairs threatens to involve us in grave danger. This attempt should not succeed. The proposed Bricker Amendment should be rejected.

The Case for Amendment

(Continued from page 210)

Furthermore, Professor Corwin does not think Section 1 would impose any new limitations on the treaty power.[29]

Another learned opponent of the Amendment, Professor Myres S. McDougal, apparently believes in amendment of the Constitution by "informal adaptation" and "usage" rather than "formal textual alteration". In 1945 he wrote:[30]

> In preferring to alter the Constitution by informal adaptation, the American people have also been motivated by a wise realization of the inevitable transiency of political arrangements. The ultimate advantage of usage over formal textual alteration as a method of constitutional change is that, while it preserves the formal symmetry of the document, it reduces the danger of freezing the structures of government within the mold dictated by the expediencies or political philosophy of any given era. A formal amendment may be outmoded shortly after it is adopted, but usage permits continual adjustment to the necessities of national existence. Thus the Constitution is enabled to fulfil its role as a symbol of national unity and continuity, while nevertheless being ceaselessly adapted, as its Framers intended, to the problems of "ages to come."

Where this would leave any limitation on the treaty power believed to exist at any given time or from time to time seems clear.

Still another opponent of amendment, in discussing the proposed International Criminal Court states:[31]

> Recently the Supreme Court has refused to review convictions by the Tokyo and Nuremberg tribunals on the ground that international tribunals established by treaties do not exercise the judicial power of the United States. Consequently, if an international criminal court should be established by treaty, its procedure would not be limited by provisions of the constitutional Bill of Rights.

He thus asserts that by treaty we could set up an international criminal court, which, under certain circumstances, could try our citizens for acts done within the United States, but which would not be bound even by the prohibitions of our Bill of Rights. If that would not be destroying the safeguards of our constitutional Bill of Rights by the treaty route, no more can possibly be said!

A treaty to establish an International Criminal Court is in process of being drafted. The original draft

29. July, 1953, issue of *Think*, where Professor Corwin stated: "In short, Section 1 of the Bricker proposal, which specifies no new limitations to the treaty power, would leave things just as they stand today—it would be surplussage". He did not there comment on the right to pass on treaties which Section 1 would unquestionably confer on the courts.

30. McDougal and Lans, cited *supra*, note 4, at page 294.

31. Quincy Wright, 26 *Southern California Law Review* 392.

would have eliminated both indictment by a grand jury and trial by jury and it failed to afford adequate protection against the introduction at the trial of an accused of an involuntary confession made by him.[32]

Even as revised last year, there is no indictment by a grand jury, no adequate protection against involuntary confessions and a jury trial only if the instrument conferring jurisdiction so provides; but this is an instrument of the adhering state, not of the accused.[33]

Finally, we have the considered opinion of the present Secretary of State expressed in 1952:

> . . . whereas treaty law can override the Constitution. Treaties, for example, can take powers . . . from the States and give them to the Federal Government or to some international body, and they can cut across the rights given [*sic*] the people by their constitutional Bill of Rights.[34]

With a record such as just outlined, can it possibly be said with certainty that there is any limitation on the treaty power, even in the minds of those who regard it as exclusively a delegated power?

If there were less doubt than there is that a treaty or treaty law may override the Constitution, nothing should be allowed to stand in the way of an amendment which would dispel that doubt for all time.

Other arguments made against the Amendment are equally unconvincing and totally unimportant unless there is some limitation on the treaty power itself.

It is argued that in government we must trust somebody; that we can trust any one of the three branches of our government; and that if we cannot it would be futile to trust in a written Constitution.

That argument proves too much. If a Constitution is worthless without such complete confidence in each of the separate instrumentalities it sets up as this argument would suggest, why a Constitution at all? Why provisions for impeachment and removal from office? What of history which demonstrates that constitutional requirements have not always been adhered to, either by the Congress in enacting statutes or by the President himself, as in the seizure of the steel mills? Why was the Bill of Rights demanded and added to the Constitution?

Of course we must trust someone and we do so daily and in every walk of life. That is not the question; but rather what basic rules should be laid down to circumscribe the area within which that trust shall be vested.

The founding fathers understood this. Hamilton wrote in the seventy-fifth *Federalist Paper:*

> The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States.

And Jefferson wrote in the famous Kentucky Resolutions:[35]

> . . . that it would be a dangerous delusion were a confidence in the men of our choice to silence our fears for the safety of our rights; that confidence is every where the parent of despotism; free government is founded in jealousy, and not in confidence; it is jealousy, and not confidence, which prescribes limited constitutions to bind down those whom we are obliged to trust with power. . . .
>
> In questions of power, then, let no more be said of confidence in man, but bind him down from mischief by the chains of the Constitution.

The argument, referred to above, that a self-executing treaty (which is not a law of Congress) might impair the protection of the First Amendment providing that "Congress shall make no law" respecting an establishment of religion, freedom of speech and of the press overlooks the implications of Mr. Justice Holmes's statement in *Missouri* v. *Holland:*

> Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention.

The argument overlooks also the statement in *United States* v. *Pink* that "the Fifth Amendment does not stand in the way of giving full force and effect to the Litvinoff Assignment" and the comment of Dr. Philip C. Jessup that "From the point of view of our constitutional law, the decision may well mark one of the most far-reaching inroads upon the protection which it was supposed the Fifth Amendment accorded to private property".[36]

No comfort is to be drawn from citation of authorities dealing with purely internal statutory or administrative acts. We are dealing with the treaty power!

The proposition that comfort should be drawn from the admitted fact that no treaty has ever been declared unconstitutional, has already been dealt with.

There is little profit either in asserting or in questioning the oft repeated assertion of opponents that the present constitutional provisions have served us well for 165 years, because it is not the past 165 years we must regard, but the present—the tendency which has been developing during recent years to consider treatymaking as a way to effectuate domestic reforms.[37]

In 1920 the Supreme Court in *Missouri* v. *Holland,* through Mr. Justice Holmes, rendered opponents' argument in this regard as dead as the dodo bird when he said:

> The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago . . . . We must consider what this country has become

32. Appendix C, Report of A.B.A. Comm. on Peace and Law, February 1, 1952, page 31; 38 *A.B.A.J.* 641, 644; August, 1952.

33. *U.N. Bulletin,* September 1, 1953, pages 196-198, Articles 33, 35, 37, 38.

34. 1953 Hearings, page 862. Secretary Dulles believed that concern over the use of the treaty power to effectuate reforms "particularly in relation to social matters, and to impose upon our Republic conceptions regarding human rights which many felt were alien to our traditional concepts" was legitimate; but that arousing concern corrected "the evil" (page 824). He had even tried drafting an amendment himself (page 866). He stated: "We do not consider that you properly can or constitutionally can use the treaty device in order to effectuate internal reforms" (page 878). *See also* footnote 5.

35. 4 Elliot's Debates 543.

36. *U. S.* v. *Pink,* 315 U. S. 203 (1942); 36 *Am. Jour. of Intl. Law* 282 (1942).

37. 1953 Hearings page 824.

in deciding what that Amendment [the Tenth] has reserved... No doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power.

The case in which he spoke was dealing with no conventional treaty of friendship, commerce and navigation, but with the first situation that has been discovered in the history of this nation where the government deliberately sought and made a treaty for the express purpose of conferring on itself legislative competence in domestic fields where it had none before. This occurred more than a century and a quarter after the Constitution was adopted!

It was sixteen years later in 1936 that Mr. Justice Sutherland stated in *United States* v. *Curtiss-Wright* (299 U. S. 304, 318) that the power

to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality....[38]

The learned Justice may have been declaring the international point of view—the view among nations looking at the United States as a member of that family; but, it is submitted that, he was far from the facts as regards the internal constitutional status of the treaty power—which is a delegated power.

Section 1 of the Amendment would not stop with forbidding treaties which interfered with personal rights or infringed on fundamental constitutional guarantees or which violated a constitutional prohibition. Section 1 would invalidate any treaty provision in conflict with the Constitution. It would require the treaty power to live in harmony with the rest of the Constitution.

To illustrate: Section 1 of Article 1 vests in the Congress "all legislative powers herein granted". Here are no "prohibitory words" or "fundamental or basic constitutional guarantees". But if a treaty attempted to transfer legislative power from the Congress to any foreign or international body, it would conflict with that provision and should be stricken down; for, in the language of the Supreme Court,

The powers of government are delegated in trust to the United States, and are incapable of transfer to any other parties. They cannot be abandoned or surrendered.[39]

Section 2 of the Amendment states:

A treaty shall become effective as *internal law* in the United States only through legislation which would be valid in the absence of treaty [Italics added].

This would have no effect whatever on treaties which did not attempt to change our internal domestic law.

Courts sometimes disagree as to whether particular treaty provisions create internal law under Article VI.[40] But under this section of the Amendment, legislation would be required to change our internal law and that possibility of doubt would be eliminated. Both courts and citizens would know *what* was intended to govern them, *when* it was to take effect, and *where* to look for it.

As of 1950 twenty-four nations required all treaties to be submitted to the approval of the national legislatures and twenty-eight nations required "parliamentary approval of all treaties which affect internal law, the right of citizens, or which need implementation by legislation".[41]

In Great Britain an act of Parliament is necessary to give effect to a treaty which would change their internal law.[42] The same is true in Canada.[43]

Since with us a treaty becomes supreme domestic law automatically unless its terms call for legislation to effectuate it, a treaty could be internal law here and not effective within the other country.

Opponents' Positions Are Not Consistent

Opponents argue that this inequality could be met by our inserting a treaty provision postponing internal effectiveness with us until the other party legislated. They also argue that securing the rights of our citizens abroad requires that treaties be operative at once. These positions quarrel, and the latter would have more persuasiveness if opponents would point to countries (other than the twenty-eight where speed on our part may not make the treaty operative abroad) with which it is desirable that treaties should be immediately effective.

Those favoring amendment think legislation is always desirable both because it is always required in many other major countries and also because we are dealing here with our domestic law, which one should be able to find in the statute books.

It is asserted by opponents that the framers of the Constitution con-

38. See footnote 2 *supra*.

39. *The Chinese Exclusion Case*, 130 U.S. 581, 609 (1889).

40. See *Fujii* v. *California*, 217 P. 2d 481, 218 P. 2d 595, 242 P. 2d 617. Writers on the subject also disagree. Hudson, "Charter Provisions on Human Rights in American Law", 44 *American Journal of International Law* 543 (1950); Wright, 45 *American Journal of International Law* 62 (1951).

In Oyama v. *California*, 332 U.S. 633 (1948), the Supreme Court found that the Alien Land Law of California denied equal protection of the laws to the infant citizen, Oyama. The decision was by a divided court—six to three. In the concurring opinion of Mr. Justice Black (joined in by Mr. Justice Douglas) it is stated (page 649): "There are additional reasons now why that law stands as an obstacle to the free accomplishment of our policy in the international field. One of these reasons is that we have recently pledged ourselves to cooperate with the United Nations to 'promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.' How can this nation be faithful to this international pledge if state laws which bar land ownership and occupancy by aliens on account of race are permitted to be enforced?"

The concurring opinion of Mr. Justice Murphy (joined in by Mr. Justice Rutledge) stated (page 673):

"Moreover, this nation has recently pledged itself, through the United Nations Charter, to promote respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion. The Alien Land Law stands as a barrier to the fulfillment of that national pledge. Its inconsistency with the Charter, which has been duly ratified and adopted by the United States, is but one more reason why the statute must be condemned."

41. Report, September 1, 1950, American Bar Association Committee on Peace and Law Through United Nations, pages 11, 55.

42. McNair, *The Law of Treaties*, pages 7-8. *Case and Comment*, September-October 1953, page 17, quoting *The Law Times* (England) April 24, 1953: "As previously stated, where a treaty imposes financial burdens of [sic!] the community—as, for example, treaties of commerce, which may affect scales of import duties—parliamentary sanction is essential. The curious result may follow that, while a treaty is perfectly valid 'internationally', it may be completely without effect so far as British subjects are concerned."

43. *Canada* v. *Ontario*, [1937] A.C. 326, 347; 1953 Hearings 920, 835; *Canadian Bar Review*, November, 1951, page 969.

sidered and rejected a proposal for participation by the House of Representatives in treaty-making.

The proposal to which opponents refer was that "no treaty shall be binding on the United States which is not ratified by a law".[44] Section 2 of the Bricker Amendment, on the other hand would permit the treaty to become binding upon the United States immediately under international law and would have no effect on any treaty unless it sought to alter our internal law. The difference is obvious.

Professor McDougal, who joins in objecting to giving the House of Representatives a voice in legislating in implementing treaties as domestic law, sees no objection to participation by the House of Representatives in making congressional-executive agreements for after quoting from a letter of Jefferson, he wrote:

> Considered in this spirit, the most significant fact about the motives which are supposed to have impelled the Framers to exclude the House of Representatives from the treaty-making process and to require the Senate to give its consent by a two-thirds majority is that none of them have any validity today; most indeed were outmoded within fifty years after the drafting of the Constitution.

And

> The result is that our constitutional law today makes available two parallel and completely interchangeable procedures, wholly applicable to the same subject matters and of identical domestic and international legal consequences, for the consummation of intergovernmental agreements.

He was referring to treaties and to executive agreements and he said there is what may be called an "agreement-making procedure, which may operate either under the combined powers of the Congress and the President or in some instances under the powers of the President alone" and

> In such a system the survival, as a sort of constitutional vermiform appendix, of an additional undemocratic mode of validating international agreements by the two-thirds vote of a single house, can do no harm to the national interest, if it is agreed by all parties that this mode of validation is not exclusive of the more democratic mode and that its continued existence is not to be used to obfuscate issues of substantive policy by the invocation of procedural subtleties.[45]

It is objected that it might be difficult to determine what effects as internal law a treaty might have. It is not shown, however, that other countries experience this difficulty.

It is objected that a treaty might have unintended internal effects. A plea for law by inadvertence scarcely appeals.

The argument that the treaty process would be exceedingly cumbersome under Section 2 because of legislation being required to change internal law might be directed against our entire system of law enactment. The fact that the legislative process will insure complete airing of the proposals and public knowledge of what is being done to the laws governing their daily lives more than counterbalance any argument of alleged cumbersomeness.

In the *Sawyer* case (343 U. S. 579) both Justices Frankfurter (page 613) and Douglas (page 629) quoted the dissent of Mr. Justice Brandeis in *Myers* v. *United States*, 272 U. S. 52, 293 as follows:

> The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

This should be a sufficient answer to those who plead for speed and certainty in making international agreement so far as internal law is concerned.

In 1787 it was thought "that the necessity of secrecy in the case of treaties forbade a reference of them to the whole legislature".[46] No one should be heard today to advocate secrecy in the enactment of domestic laws.

Were Section 2 adopted the world would be on notice that we, like many other nations, require legislation to make a treaty effective internally.[47]

Reliance on the power of Congress to breach our international agreements subsequently by nullifying their internal effect by legislation, is scarcely to be recommended, although opponents put much reliance on it.[48]

It is sometimes said that the consent of two thirds of the Senate present partakes of the nature of a legislative act. The complete answer is Article I, Section 1 of the Constitution as well as the pressure in the Senate to ratify treaties presented.[49]

The second effect of Section 2 of the Amendment would be to prevent the Federal Government from acquiring by treaty additional legislative competence in domestic affairs beyond that possessed by it in the absence of treaty.

In 1916, after a federal game law was declared unconstitutional as not within the powers delegated to the Federal Government, our State Department deliberately negotiated a treaty with Great Britain for the express purpose of being able to sustain such a game law, when again passed, as "necessary and proper" to our treaty obligations. Here was no commercial treaty—no conventional treaty of any kind. But the "bootstrap" operation succeeded. The new game law was upheld in a decision (*Missouri* v. *Holland*, 252 U. S. 416 (1920)), which has been said dangerously to approach a constitutional amendment.[50] Mr. Justice Holmes said:

> If the treaty is valid there can be no dispute about the validity of the statute under Article I, §8, as a necessary and proper means to execute the powers of the Government.

44. 2 Farrand 392-394.

45. McDougal and Lans. op. cit., pages 545, 187, 535, and see page 211.

46. 2 Farrand 538: ". . . decision, secrecy, and dispatch, are incompatible with the genius of a body so variable and so numerous." 75th Federalist Paper (Hamilton) (italics his); see also 5 Elliot 523.

47. 5 Hackworth, *Digest of International Law* 154.

48. See Hughes "Recent Questions and Negotiations", 18 *American Journal of International Law* 229, at page 230 (1924).

49. See 1953 Hearings, page 728.

50. Lauterpacht, *An International Bill of Rights of Man*, page 179.

Eighty-four years earlier the Supreme Court had said

> Congress cannot, by legislation, enlarge the federal jurisdiction, nor can it be enlarged under the treaty-making power.[51]

Opponents invariably cite *Ware* v. *Hylton* as a bulwark of their argument and as a precedent for *Missouri* v. *Holland*. The argument will not withstand analysis.[52]

No longer is a single reserved power of the states safe against destruction by the Federal Government under the doctrine of *Missouri* v. *Holland* that

> No doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power.

Section 2 of the Bricker Amendment would overrule the doctrine of *Missouri* v. *Holland*.

The Committee on Amendments to the Federal Constitution of the New York State Bar Association, although opposing amendment, truly said in its report presented in June, 1952:

> The principle announced in *Missouri* v. *Holland* has a logical ground and is based on express constitutional provisions. As applied to treaties normally within the treaty power it is satisfactory enough, but if it is to be applied to such pacts as the Covenant on Human Rights it would be destructive of the existing division of authority between states and nation. In that case, to enlarge federal power, all that would be necessary would be for us to find some foreign nation willing to make an agreement with us as to how we would treat our own people. Such a distortion of the treaty power should be condemned as a mere device to enlarge federal power at the expense of the states and not within the treaty power.[53]

Federal Government Is One of Delegated Powers

While opponents of the Amendment rely on the fact that the treaty power, the field of foreign affairs, is delegated to the Federal Government and forbidden to the states, they must and do admit that in the domestic field power is divided between nation and the states by the Constitution itself, the Federal Government being one of delegated and limited powers at least in that field.[54] This division of powers over domestic matters is fully as fundamental to our form of government as the former, and division of power in the domestic field must continue and, what is more, must be respected if our concept of a federal republic is to endure. If delegated federal power in the foreign field can be used to destroy its equal partner, the principle of division of powers domestically, then as proponents of amendment contend, the treaty power can be used to destroy the powers of the states.

That, however, is the situation today under the doctrine of *Missouri* v. *Holland*.

It is clear then, that today there exists no reliable protection against the power over foreign affairs swallowing up and extinguishing the cardinal concept of division of powers over domestic affairs between nation and state.

In the Constitutional Convention of 1787, James Madison said:[55]

> The object of treaties is the regulation of intercourse with foreign nations, and is external.

Alexander Hamilton wrote of treaties:[56]

> They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign.

Later Jefferson wrote in his *Manual of Parliamentary Procedure* that the Constitution in the grant of the treaty power "must have meant to except out of these the rights reserved to the States. . . ."[57]

Use of the doctrine of *Missouri* v. *Holland* has been urged to effectuate social reforms within our country and to make our domestic social, cultural and economic affairs the concern of foreign nations and international bodies.

Already the division of *power* between nation and states to legislate in domestic affairs has been destroyed by a treaty which pledges the Federal Government to take separate action in co-operation with the United Nations and joint action with it and the other member nations for the achievement of the widest types of social and economic objectives which might well cover almost every human activity and relationship from the cradle to the grave.[58] Under *Missouri* v. *Holland*, the Federal Government could move into these fields legislatively and thus oust the states completely. The test of the validity of federal legislation is no longer whether the legislation is valid under the Constitution—it might be invalid considered by that standard alone—but whether in the light of *Missouri* v. *Holland* it is

51. *New Orleans* v. *United States*, 10 Pet. 662, 736 (U.S. 1836).

52. *Ware* v. *Hylton*, 3 Dall. 199; 1 City Bar, page 12; 39 *A.B.A.J.* 805; It must be remembered that *Ware* v. *Hylton* dealt with the treaty of peace of 1783 and in that connection Justice Chase said: "The authority to make war, of necessity implies the power to make peace; or the war must be perpetual" (page 232). And

"A right to make peace, necessarily includes the power of determining on what terms peace shall be made" (page 236). And since under Article IX of the Articles of Confederation the "united states in congress assembled" had the exclusive right "of determining on peace and war" there was no question of interference with reserved rights of the states (or corresponding rights) in *Ware* v. *Hylton*.

53. 1953 Hearings, page 49. That Committee included in its membership William D. Mitchell and John W. Davis, Lewis R. Gullick, John J. Mackrell and also Harrison Tweed who was separately recorded.

54. This *domestic* division exists under the Constitution at least in that field whether or not opponents believe the treaty power to be exclusively one of the delegated powers or an inherent power not derived solely from the Constitution and perhaps therefore not subject to its limitations. If the latter is their position where do they find the consent of the states to have their part of the domestic field invaded by a power not granted by them?

55. 3 Elliot's Debates, 514.

56. *75th Federalist Paper*.

57. 81st Cong., 2d Sess., H. Doc. No. 739, page 283 (1950).

58. Articles 55 and 56 of the United Nations Charter, read:

Article 55

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

a. higher standards of living, full employment, and conditions of economic and social progress and development;

b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56

All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.

See footnote 40 *supra*.

valid under Articles 55 and 56 of the United Nations Charter.

The Draft Covenant on Economic, Social and Cultural Rights,[59] if adhered to, would require the United States

> to take steps, individually and through international cooperation, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in this Covenant by legislative as well as by other means.

and these rights again embrace all kinds of social, economic and cultural objectives—all defined in the widest and most general terms.[60]

Mr. John P. Humphrey, while Director of the Division of Human Rights of the United Nations, stated unequivocally:[61]

> What the United Nations is trying to do is revolutionary in character. . . . What is now being proposed is, in effect, the creation of some kind of supranational supervision of this relationship between the state and its citizens.

While Secretary Dulles does not believe that the treaty device can properly or constitutionally be used to effectuate internal reforms,[62] and while the present administration did not intend to become a party to any such treaty, [63] those who advocate the propriety of treaties for " 'supranational supervision' of the relationship of a state to its own citizens" although apparently revolutionary,[64] will undoubtedly continue to press for this type of revolutionary step.

As late as April 8, 1953, The *New York Times* stated editorially:

> The resolution [Bricker Amendment] is dangerous because it forbids *any treaty that would allow any foreign Power or any international organization* (meaning the U.N. or one of its agencies) *to control the constitutional rights of American citizens within the United States* "or any other matter essentially within the domestic jurisdiction of the United States." [Italics added].

When, if ever, control over our constitutional rights within our own country is to be given to and become the business of any foreign power or international organization, it should only be done by constitutional

amendment on which the voice of all the people will be heard.

Opponents of amendment say that treaties of friendship, commerce and navigation cannot secure rights for our citizens abroad unless they confer reciprocal rights on aliens here and that in this connection the Federal Government must be able to invade powers otherwise reserved to the states. But do opponents say that an exception to Section 2 of the Amendment in favor of reciprocal treaty rights of aliens would satisfy them? Furthermore, in 1953 five treaties (with Denmark, Ethiopia, Greece, Israel and Japan) were ratified, which made the right of the aliens involved to acquire real property dependent upon local laws.[65] Earlier treaties had done the same, as for example the seventh article of the treaty with France of 1853, dealt with in *Geofroy* v. *Riggs*, 133 U. S. 258, the treaty with China of 1946 and with Italy of 1948. There is no showing that any of these provisions were operative in all of our states and as designed they may well not have been.

Thus any suggestion that Section 2 would leave a no man's land in the treaty field[66] is contradicted by treaties we have made in the past. With how a treaty shall be made effective as internal law, no foreign nation with whom we contract has any business.[67] The contention is open to challenge legally because as the Privy Council pointed out in the case of *Canada* v. *Ontario*, [1937] A. C. 326, 353:

> It must not be thought that the result of this decision is that Canada is incompetent to legislate in performance of treaty obligations. In totality of legislative powers, Dominion and Provincial together, she is fully equipped. But the legislative powers remain distributed. . . .

There is nothing in the Constitution which forbids a state from passing a law which is consonant with a treaty made by the Federal Government touching domestic matters wholly within the state's jurisdiction, absent the treaty; and certainly there would not be after the amendment. To pass such a statute would not involve any treaty, agreement or compact with a foreign power, but enactment of local law. The existing laws of the various states relating to land tenure by aliens is a case in point.[68]

The time has come and developments demand the implementation by constitutional amendment of those wise words of the late Chief Justice Hughes:

> But if we attempted to use the treaty-making power to deal with matters which did not pertain to our external relations but to control matters which normally and appropriately were within the local jurisdictions of the States, then I again say there might be

59. *United Nations Bulletin*, September 1, 1952, page 253.

60. *Ibid*, pages 254 and 255. It is said that scores of multilateral treaties are being drafted under the aegis of the United Nations and its affiliated agencies. In addition to those mentioned, the Genocide Convention, the draft Convention on Freedom of Information, the Convention on the Gathering and International Transmission of News and Right of Correction, and not less than ninety-three conventions prepared by the I.L.O. dealing with all sorts of domestic internal problems (1953 Hearings, page 537) should be noted.

61. Annals of the American Academy of Political and Social Science, January, 1948.

62. 1953 Hearings, page 878.

63. *Ibid*. 825; but as a loyal member of the United Nations we are continuing to participate in technical drafting. State Department Bulletin, August 17, 1953, page 216; and see *id*. April 20, 1953, page 579; *id*. June 15, 1953, page 842.

64. Moskowitz, 35 *A.B.A.J.* 359; April, 1949. See also *ibid*. at pages 285 and 286.

65. Executive I, F, J and R., Senate, 82d Cong., 2d Sess.; Articles IX; Executive O, Senate 83d Cong., 1st Sess., Article IX.

66. 1953 Hearings 829; 8 *Record Assn. of the Bar N.Y.C.* No. 9, page 13. This Report states: "In our dealings with other countries we must speak with one voice." The Amendment would not affect this although it might well affect what that voice said as related to our domestic law.

67. *Taylor* v. *Morton*, 2 Curtis 454, *affd*. 2 Black 481 (U.S. 1862).

68. 1953 Hearings, page 1123.

ground for implying a limitation upon the treaty-making power that it is intended for the purpose of having treaties made relating to foreign affairs and not to make laws for the people of the United States in their internal concerns through the exercise of the asserted treaty-making power.[69]

Section 3 of the Amendment reads:

> Congress shall have power to regulate all executive and other agreements with any foreign power or international organization. All such agreements shall be subject to the limitations imposed on treaties by this article.

Executive agreements are nowhere mentioned in the Constitution. Some are unquestionably a necessity. Great numbers of them have to do with "governmental housekeeping". They have been discussed at great length.[70]

As noted earlier, however, only recently has an executive agreement, made without the intervention of either house of Congress, been held by the courts to be on a parity with treaties as supreme law of the land under Article VI.

The term executive agreement has been used to refer to two classes and possibly to a third class of agreements as follows:

1. Those made by the Executive alone.

2. Those made by the President pursuant to express congressional authority.

3. Those made by the President and specifically conditioned on subsequent approval by the Congress.

Obviously that part of Section 3 of the Amendment providing that Congress shall have power to regulate all executive and other agreements with any foreign power or international organization, can have nothing to do with classifications 2 and 3 but only those made by the Executive alone.

United States v. *Belmont*, 301 U.S. 324 (1937), involved the Litvinoff Assignment, which included an assignment to the United States of amounts due the Soviet government "from American nationals" by reason of Russia's nationalization decrees. Neither house of Congress participated in making the agreement. Mr. Justice Sutherland (who wrote the *Curtiss-Wright* opinion), stated for a majority of the Supreme Court:

> Plainly, the external powers of the United States are to be exercised without regard to state laws or policies. The supremacy of a treaty in this respect has been recognized from the beginning. . . . And while this rule in respect of treaties is established by the express language of cl. 2, Art. VI, of the Constitution, the same rule would result in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states. Compare *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 316, *et seq.* In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist [page 331].

In *United States* v. *Pink*, 315 U.S. 203 (1942), the Court stated:

> A treaty is a "Law of the Land" under the supremacy clause (Art. VI, Cl. 2) of the Constitution. Such international compacts and agreements as the Litvinoff Assignment have a similar dignity. *United States* v. *Belmont*, *supra*, 301 U.S. at page 331 (page 230).

In *Etlimar Société Anonyme* v. *United States*, 106 F. Supp. 191 (Ct. Cl. 1952) it was said at page 195:

> The Byrnes-Blum Agreement between the United States and France is the type of agreement which has been recognized as a treaty within the meaning of Article VI, Clause 2, of the Constitution and thus is a part of "the supreme Law of the Land."

Here then, an executive agreement nowhere mentioned in the Constitution is given the same supreme law effect as a treaty.

So we have progressed from the point where not only can the Congress legislate in domestic affairs in implementation of a treaty in direct derogation of the rights reserved to the states by the Tenth Amendment (or by failure to delegate them to the Federal Government, as you please) to the point where one single person may make domestic law, overruling state laws and constitutions by executive agreements with foreign powers.

Not even the wildest antagonist of the Amendment could call this a legislative act by the widest stretch of imagination.

It is said that this power to make executive agreements—without congressional authorization—comes from the President's powers as Chief Executive, as Commander in Chief, and the organ for foreign affairs.[71]

But where foreign commitments have richocheted into domestic or internal matters, the Supreme Court has recently expressed itself more fully than previously on presidential powers.

In *Youngstown Sheet & Tube Co.* v. *Sawyer* (343 U.S. 579), the opinion of the Court, delivered by Mr. Justice Black, contains this significant language:

> In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute [citing Article I Section 1 of the Constitution.] . . . The Constitution does not subject this lawmaking power of Congress to presidential or military supervision or control [pages 587, 588].

and Mr. Justice Jackson said:

> But no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture [page 642].

And

69. Proceedings of American Society of International Law, 1929, page 196. Secretary Dulles, 1953 Hearings, page 825: "I do not believe that treaties should, or lawfully can, be used as a device to circumvent the constitutional procedures established in relation to what are essentially matters of domestic concern."

70. Borchard, "Shall the Executive Agreements Replace the Treaty?" 53 *Yale L. Jour.* 664 (1944). McDougal and Lans, cited *supra* note 4. Borchard, "Treaties and Executive Agreements—A Reply", 54 *Yale L. Jour.* 616 (1945). Report of Comm. on Peace and Law, September 1, 1952, pages 10-18, and additional authorities there cited.

71. McDougal and Lans, *op. cit.* note 4 at pages 244 *et seq.*

> It [Congress] is also empowered to make rules for the "Government and Regulation of land and naval Forces," by which it may to some unknown extent impinge upon even command functions [page 644].

And

> We should not use this occasion to circumscribe, much less to contract, the lawful role of the President as Commander in Chief. I should indulge the widest latitude of interpretation to sustain his exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society. But, when it is turned inward, not because of rebellion but because of a lawful economic struggle between industry and labor, it should have no such indulgence. His command power is not such an absolute as might be implied from that office in a militaristic system but is subject to limitations consistent with a constitutional Republic whose law and policy-making branch is a representative Congress. The purpose of lodging dual titles in one man was to insure that the civilian would control the military, not to enable the military to subordinate the presidential office. No penance would ever expiate the sin against free government of holding that a President can escape control of executive power by law through assuming his military role. What the power of command may include I do not try to envision, but I think it is not a military prerogative, without support of law, to seize persons or property because they are important or even essential for the military and naval establishment [page 645].

The District Court in *United States* v. *Capps* (100 F. Supp. 30) upheld an executive agreement dealing with import of potatoes from Canada, placing reliance on the *Curtiss-Wright*, *Belmont* and *Pink* cases. The Court of Appeals for the Fourth Circuit reversed (204 F. 2d 655) and held the executive agreement void as "not authorized by Congress", as contravening "provisions of a statute dealing with the very matter to which it related" and because Congress has authority over foreign commerce, "the Executive may not exercise the power by entering into executive agreements". Certiorari was granted by the Supreme Court where the case now pends.

The Secretary of State, Mr. Dulles, testified that of the whole series of executive agreements made at Yalta, the ones having a long-range permanent effect could not properly have been made by the President and could have no legal effect until made as treaties—with the same for those made at Teheran.[72] Senator Watkins remarked.[73]

> I agree they never had force of law. They were completely illegal and invalid, but it is done.

Originally Senate Joint Resolution 1 would have required advance congressional authority for executive agreements. As reported out it confirms in Congress the power to regulate them but does not require advance authorization and unnecessary or unwise congressional interference is not to be presumed, especially when a presidential veto would call for a two-thirds vote in both houses. But no executive agreement could become internal law or the supreme law of the land without legislative implementation.

> Some future generation may, however, deem it so urgent that the President have legislative authority that the Constitution will be amended. [343 U. S. 579, 633. Douglas, J.]

Probably Congress now has power under the necessary and proper clause to regulate executive agreements, [74] but this power must not be left in doubt.

Any claim that Section 3, in affirming the right of Congress to control executive agreements, would change the balance of power in the Federal Government, presupposes that the power does not now exist.[75]

Obviously it would be foolish to restrict the treaty power and leave the door open for a "lateral pass" *via* executive agreements.

The assertion that reciprocal trade agreements would require both initial authorization by Congress and also subsequent approval by Congress unless Congress authorized the exact terms in advance overlooks the fact that congressional-executive agreements are not executive agreements in the true sense of the term, but joint acts by Congress and the President, involving in the case of reciprocal trade agreements, and the like, permissible "delegations" of power by the Congress to the Executive over that part of the subject matter of the agreements which rests

72. 1953 Hearings, pages 873, 885.

73. 1953 Hearings, page 885.

74. See Report of American Bar Association Comm. on Peace and Law, September 1, 1952, page 12; *Ex Parte Quirin*, 317 U.S. 1, 25-27 (1942) *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952); 1953 Hearings, pages 711, 932 and 1244. The Supreme Court, through Mr. Justice Black, said in the *Sawyer* case (June 2, 1952): "It is said that other Presidents without congressional authority have taken possession of private business enterprises in order to settle labor disputes. But even if this be true, Congress has not thereby lost *its exclusive constitutional authority* to make laws necessary and proper to carry out the powers vested by the Constitution 'in the Government of the United States, or any Department or Officer thereof.' " 343 U.S. 579, 588. (Italics added).

75. The same argument was used against the power of the courts to declare a law of Congress unconstitutional.

in congressional competency.[76]

No reason is given for the suggestion made by some opponents why if Congress first approved an executive agreement it must later reapprove. The Amendment does not say that the legislation must follow *in time* the treaty or executive agreement. If something is already the law under competent statutory enactment it would be absurd to argue that a consonant treaty or executive agreement repealed that wholly compatible enactment and required its re-enactment.

It is wholly inaccurate to state that the Amendment would return to the general concept of states' rights in treaty matters that prevailed under the Articles of Confederation. Those articles provided (Article IX) that the United States in Congress assembled should not "enter into any treaties" "unless nine states assent to the same". What a far cry from saying that the laws of the states on subjects admittedly within their reserved powers as domestic matters shall not be made by the Federal Government beyond the latter's delegated powers over domestic legislation by a treaty bootstrap operation!

Madison said:[77]

> The management of foreign relations appears to be the most susceptible of abuse of all the trusts committed to a Government, because they can be concealed or disclosed, or disclosed in such parts and at such times as will best suit particular views; and because the body of the people are less capable of judging, and are more under the influence of prejudices, on that branch of their affairs, than of any other. Perhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger, real or pretended, from abroad.

Jefferson said:[78]

> Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction. I say the same as to the opinion of those who consider the grant of the treaty-making power as boundless. If it is, then we have no Constitution.

76. While there seems to be some dispute as to whether this is a delegation of power by Congress, at very least it must be a delegation of so much power as Congress has in the premises. See 54 *Yale L. J.*, pages 200 *et seq*; 274; 645, 648, 653.

77. Padover, "The Complete Madison", page 257, quoting a letter to Thomas Jefferson of May 13, 1798.

78. 10 Writings, lib. ed. 419.

Legal Education for Practice

(Continued from page 214)

time, for all of our students, at least in three years.[24]

Several of our critics suggest that the ultimate decision as to what the law schools should teach must be in the practicing branch of the legal profession.[25] Both bar examiners and law school faculties would, under this approach, be brought into line by changing the requirements for admission to the Bar. Aside from the fact that lawyers as individuals and as a group don't like to be told what they have to do, have these critics actually ever tried to lay out a program, staff it, finance it, and accomplish it in a three-year period?[26] What subjects should be covered? Each lawyer has his favorites—all of those which bear on his practice, and a few that he feels or knows from experience, actual or synthetic, that other lawyers find useful. In the end, all subjects will be listed. Then will come the demand for orientation courses, skill courses, problem courses, clinical training, seminars, and drafting exercises. At this point, the critic ought to begin to worry, at least a little bit.

Isn't it obvious that the job of providing a sound legal education is the concern of all branches of the legal profession—the practicing lawyer, the bar examiner, the Bench and the law teacher? The results of the Survey of the Legal Profession certainly so indicate. Many of you, I hope all, who are interested in the subject matter of this paper, have read the Survey report on bar examinations and requirements for admission to the Bar and, I trust, will read Dean Harno's recent contribution. Time and again the need for co-operation and the beneficial results of co-operation are pointed out. And I wish to stress that it is co-operation, not control, that is needed. A joint conference of interested lawyers, law teachers, bar examiners and judges in each state, meeting at least once a year, to discuss problems of legal education and how best to achieve the best possible training, would work wonders. Instead of charges and countercharges we would have constructive action and achievement. Instead of misunderstanding, we would have sound public relations and enthusiastic co-operation. Instead of mistrust, we would have faith and confidence in the integrity and ability of those charged with all phases of preparation for admission to the Bar. I don't suggest that there won't be differences of opinion, but at least this approach would provide a forum in which to discuss our problems and worries with some real hope for tangible results.

24. This article would not be complete without noting some of the other suggestions that have been made for giving law students skill training. See, for example, Volz and De Witt, "Summer Work in Legal Problems", 1 *J. of Leg. Ed.* 596 (1949); Taintor, "Required Summer Term and 'Problem' Course", 2 *J. of Leg. Ed.* 347 (1950). The Apprenticeship Approach: Silver, "Law Students and the Law: 'Experience-Employment' in Legal Education", 35 *A.B.A.J.* 991 (1949); Bryant, "Rotating Internship for Lawyers", 33 *J. of Am. Jud. Soc.* 135 (1950); Cutler; "Inadequate Law School Training: A Plan To Give Students Actual Practice", 37 *A.B.A.J.* 203 (1951); Levi, "The Graduate Legal Clinic", 38 *A.B.A.J.* 189 (1952); Stason, "Legal Education: Postgraduate Internship", 39 *A.B.A.J.* 463 (1953). The law schools would like nothing better than to implement the ideas of Pound, "A Ministry of Justice: A New Role for the Law School", 38 *A.B.A.J.* 637 (1952). See, Cross, "Law Revision in the State of Washington: The Present Picture and a Proposal", 27 *Wash. L. Rev.* 193 (1952).

25. Every thoughtful lawyer should read, Wright "Should the Profession Control Legal Education?", 3 *J. of Leg. Ed.* 1 (1950). And see, MacDonald, "The Professional Aspects of Legal Education", 2 *J. of Leg. Ed.* 444 (1950).

26. Prosser, "The Ten-Year Curriculum", 6 *J. of Leg. Ed.* 149 (1953).

The Strange Case of Alger Hiss

(Continued from page 202)

ary ruling, at least such interference with the trial court's discretion, would not be tolerated in this country. In this country, the admission and exclusion of rebuttal testimony is largely within the discretion of the trial court, and this includes the determination of whether certain testimony is proper rebuttal testimony.[24]

Corroboration—the "Two Witness" Rule

Now comes the heart of his Lordship's argument. He says that the evidence offered by way of corroboration of Chambers' story leaves him in doubt.

Trials for perjury are "tricky", *i.e.*, difficult to try—trial judges will understand this.

The "two witness" rule, or in the alternative, one witness and corroboration, *is* tricky; and it is not too surprising that the Lord Chancellor has made a fallacious application of the rule.

The true rule, according to Wigmore, involves the question of whether the corroborating evidence leads the jury to believe the accusing witness. And, Wigmore significantly adds, where a defendant takes the stand, he may by his own conduct provide the needed corroboration.

Hiss did take the stand; he offered the same explanation of how the forty-two documents came to be copied on the Hiss typewriter that caused the *grand* jury "to laugh out loud". Judge Goddard, a veteran of twenty-three years of trial duty, told the jury they could find corroboration either in the evidence presented by the Government *or in the evidence presented by the defendant* (page 330). The Court of Appeals thought Hiss's theory that Chambers or his agents had got into the Hiss house and used his typewriter, or got into the house of the colored Catlett family to whom the typewriter was given at a disputed date, and typed forty-two documents, the originals first having been stolen from the State Department and of necessity later returned, all without detection, approached "sheer speculation". (Page 830, first column of the opinion.)

Is it so unusual that a criminal defendant, by taking the stand and offering evidence, strengthens the Government's case? Could the jury not have reasoned that Hiss's conduct and tactics on these occasions provided corroboration of Chambers' claim that Hiss had furnished documents?

What has just been said is designed to show that there was *other* corroborative evidence in the case than the documents themselves, contrary to the Jowitt view that *only* the documents tended to furnish corroboration (page 39).

Now let us meet the Lord Chancellor on his own ground, and examine the documents.

Lord Jowitt states three propositions.

1. *The four documents in Hiss's handwriting.*

Circumstances damaging to Hiss here were that Sayre, Assistant Secretary of State, and Hiss's immediate superior, disputed Hiss's explanation that it was his custom to make longhand notes, such as the four documents, to be used in conferences with Sayre; and Miss Lincoln, longtime career secretary in the State Department, denied that she had ever seen longhand notes like the four documents on Hiss's desk. Lord Jowitt suggests that they may, after use in the Sayre conferences, have been thrown into the wastebasket and from there "stolen by some thief"! (Page 285.)

Since Hiss's explanation in these vital particulars did not stand up, *this debacle of his own making* provided corroboration which might have led the jury to believe Chambers, as against the architect of the discredited theory. The parallel of an alibi that fails suggests itself.

2. *The five rolls of microfilm* that came from the pumpkin.

These were photographs of copies (perhaps some originals) of State Department documents.

The Government produced the camera that made the films, and it produced the owner of the camera, Inslerman, a Communist, who lived in Baltimore in 1938 when the films were made; he had bought the camera the year before.

Having established this part of Chambers' story to be true, might the jury not conclude that the rest of Chambers' story, as to where he got the documents, was also true?

3. *The forty-two documents* copied on the Woodstock typewriter owned by Mrs. Hiss.

A wise state supreme court justice said to me, "Jowitt undertakes to get the typewriter out of the Hiss case, but he never gets it out."

What the author does is stated in the closing chapter entitled "Retrospect". It is a summation of the defense theories. In other words, to "get the typewriter out of the case", my Lord adopts the Alger Hiss theory that Chambers got into the Hiss house or the house of the colored family, the Catletts, copied forty-two documents (*in order to frame Hiss*), having first abstracted the documents from the State Department, and of course, being under the necessity of returning them without detection!

What motive did Chambers have to frame Hiss? Lord Jowitt suggests none.

"Me no lost. Trail lost." Indian saying.

By taking this position, the learned Lord shows that he has lost himself.

The question is not what defense *can* be evolved regarding the use of

24. *U. S. v. Hiss*, 185 F. 2d 822, 832 (CA 2); *Kelleher v. U. S.*, 4 F. 2d 388 (CA 1); *U. S. v. Riccardi*, 174 F. 2d 883 (CA 3); *U S. v. Crowe*, 188 F. 2d 209 (CA 7); *Diehl v. U. S.* 98 F. 2d 545 (CA 8); *U. S. v. Novick*, 124 F. 2d 107 (CA 2); 23 C. J. S. §§ 1050, 1051. Compare footnote 23.

the typewriter or whether my Lord *prefers* the highly speculative defense theory in the face of the jury verdict and the expressed views of the Court of Appeals, *but whether there were other probabilities*, reasonably susceptible of belief, namely, that Hiss, who had ready access to the documents, brought them from his office to his house where they were copied by Mrs. Hiss, the typist in the family, and by Hiss were delivered to Chambers, who kept them for "insurance" at some future time. Unless my Lord is prepared to say (as he dare not) that the Hiss theory, which my Lord finds the *preferable* one, is the *only* theory the jury might reasonably consider, then there was corroborative evidence in the attendant circumstances which the jury might, and as the Court of Appeals thought they obviously did, find sufficient to lead them to believe Chambers and to disbelieve Hiss.

Moreover, as pointed out above, Hiss's later theory, on motion for a new trial, nine months after confinement following denial of his appeals, of the recently fabricated duplicate typewriter, leaves his Lordship completely at sea.

"Beyond Any Peradventure"

> . . . in any criminal case, and more especially in a case against a man who had previously enjoyed a high reputation for integrity, we demand on both sides of the Atlantic that the case against him should be established *beyond any peradventure* [page 8].
>
> . . . is it to be seriously suggested that the burden of proof should be precisely the same in the case of a man of proved integrity as it would be in the case of an unmitigated rascal? [page 66].

What have we here? Different standards of guilt for the erring intelligentsia and ordinary mortals? Whatever may be the rule in England, that is not the law of the United States!

His Lordship's volume, vulnerable at many points, has had rough sailing. Its propriety, logic and interpretations have been broadly assailed both in England and here.[25] Its attack on the court and jury in the Hiss case is less than persuasive.

25. See the *Book Review Digest*, October, 1953; Williams, "Lord Jowitt's 'Objectivity' ", *The Freeman*, September 7, 1953; Toledano, "The Strange Case of Lord Jowitt", *American Mercury*, July, 1953; *Record of The Association of the Bar of the City of New York*, Nov., 1953, p. 413. *The London Times* (Lit. Supp. May 15, 1953) says that his Lordship's "enterprise has not worked out well". And see 39 *A.B.A.J.* 1059, at 1115, December, 1953.

The Myth of Administrative Generosity

(Continued from page 198)

Availability of Nonindustrial Benefits Does Not Explain Paradox

One possible factor might be thought to be the residual availability of nonoccupational sickness and disability benefits in Britain; that is, if a worker loses his industrial injuries claim, instead of getting nothing whatever, he gets at least the regular weekly benefits applicable to nonindustrial sickness or disability. However, these benefits may be as little as a half of his industrial benefits, so it can hardly be said that the question of industrial character of the injury is a matter of indifference. Moreover, the contrast on this score is not complete, since four important American jurisdictions themselves have nonindustrial sickness and disability plans in effect: California, Rhode Island, New Jersey and New York.

Another factor might be the prohibition of legal representation of claimants. True, counsel are permitted in the final appeal to the Commissioner, but it must be difficult to do justice to a claim if the record which goes up on appeal has been made without benefit of legal advice.

The real explanation probably lies in the difference between the administrative and judicial mind. It is sometimes said that there is no real difference except in name between administrative and judicial tribunals —after all, they are just ordinary men doing their best to decide controversies right.

But somehow there is a difference —even when, as in the case of the British Commissioner of Insurance and his deputies, the administrators are required to be lawyers. The administrator is inclined to be overawed by the letter of the statute or regulation he administers; he is apt to meet troublesome situations with the familiar response, "I'm sorry, that's what the statute says; I don't make the statutes, you know." The judge, on the other hand, who spends his life on intimate terms with the law, eventually acquires an attitude of easy familiarity toward it.[53] He will more readily cut through literal wording to get at intent and policy, or to avoid technical forfeitures for failure to do this or that within such-and-such a period of time.

53. For extreme examples in which familiarity has bred contempt, see, e.g., *U. S. v. Hutcheson*, 312 U. S. 219, 61 S. Ct. 463, 85 L. Ed. 219 (1940) (abolition of labor injunction abolishes criminal penalties); *Henderson v. Royal Indemnity Co.*, 227 Ky. 746, 14 S.W. 2d 213 (1948) (policy on 75 per cent of insured's loss satisfies statute requiring "entire liability" to be covered); *Bresnahan v. Barre*, 286 Mass. 593, 190 N.E. 815 (1934) (insured employer's immunity to suit extended to employees).

An American Case Illustrates the Point

The point is well illustrated by one of the few leading cases that have arisen under our Old Age and Survivors' Insurance statute.[54] An employee had had his pay docked for years by his employer for social security contributions, but the employer had not sent the contributions in to Washington. When the employee reached retirement age, he applied for his benefits. The statute, however, said plainly that after four years the record in Washington was final. So the Bureau of Old-Age and Survivors' Insurance denied the pension. Claimant appealed and had a hearing before a referee of the Appeals Council. The referee affirmed the denial. Claimant appealed to the full Council. The appeal was denied. Then claimant brought an action in the District Court, which promptly ordered the Administrator to pay claimant his pension. The Administrator refused to accept this decision, and appealed to the Court of Appeals. Once more the judicial mind came to the rescue, by the simple device of saying that the provision on finality of records could not apply here since there were no records—there was only an absence of records. The administrative performance in this case, then, consisted of adhering, through three levels of decision, to an admittedly outrageous result, and, in addition, of persisting in fighting reversal of the result through two judicial levels.

The decisions of the English Commissioner of Insurance, in all branches of National Insurance, have similarly been insistent upon technicalities, however harsh the resulting forfeitures. Thus, when a mental patient's guardian mislaid the patient's order book which must be produced to obtain pension benefits, it was held that all the patient's rights were lost.[55] Failure to make a claim for benefits within the required time has been held not excused by serious illness[56] or by sending the claim to the employer in reliance on the employer's previous practice of forwarding claims to the proper authorities.[57] The rule that ignorance of the law is no excuse is uncompromisingly applied,[58] and even ignorance of the seriousness of an illness has been rejected as a reason for failure to make claim in time.[59] Occasionally a more humane decision appears,[60] but the over-all impression one gets is certainly not one of a benevolent administration trying at all costs to see that the benefits provided by the legislation get to those who need them.

The popular notion is that if you give salaried public servants the job of handing out public funds, they naturally will be as open-handed as they can possibly find any excuse for being, since, after all, such largesse does not cost the administrator anything out of his own pocket. But the present analysis seems to confirm what practitioners before administrative commissions have often observed, that, whether it means money out of his own pocket or not, the seasoned administrator in charge of distributing public funds is capable of developing as high a capacity for resistance to parting with money as any insurance claims manager. This is partly because, when you have no employer or insurer resistance, the entire burden of resisting claims is thrown upon the administrator, and he is forced by this circumstance to generate a defensive attitude on behalf of the public to take the place of the missing private defense. This is quite different from the position of a court, which can be completely impartial since the side-taking function is performed by the parties, and is indeed the reverse of the position of the administrator in American compensation tribunals who, far from supplying the element of resistance, usually doubles in the role of advocate for the unrepresented claimant.

The principal conclusion to be drawn from all this is that anyone who is disposed to argue that we ought to copy the British system so as to substitute the enlightened generosity of administrators for the benighted heel-dragging of courts, insurers and lawyers, will have to find another argument. There may or may not be other arguments for such a change—it is not the province of this article to dispose of all of them; but this particular contention, at least, will not bear the test of point-by-point factual analysis.

54. *Ewing* v. *Black*, (6th Cir. 1949) 172 F. 2d 331.
55. No. C. W. G. 6/50.
56. No. C. G. 207/49.
57. No. C. S. 99/49.
58. Nos. C. G. 15/48, C.W.S. 3/48, C.S. 35/48, C.S.G. 6/48, C.W.G. 2/49, C.S.G. 9/49, C.S. 156/49, C.S. 371/49, C.S. 270/50 etc.
59. Nos. C.S. 596/49 and C.S. 537/49.
60. See, e.g., No. R(S) 14/51 (wife of disabled veteran with epilepsy, whose four children had whooping cough followed by measles, mislaid postal draft); No. C. S. 50/50 (erroneous advice of counsel an excuse).

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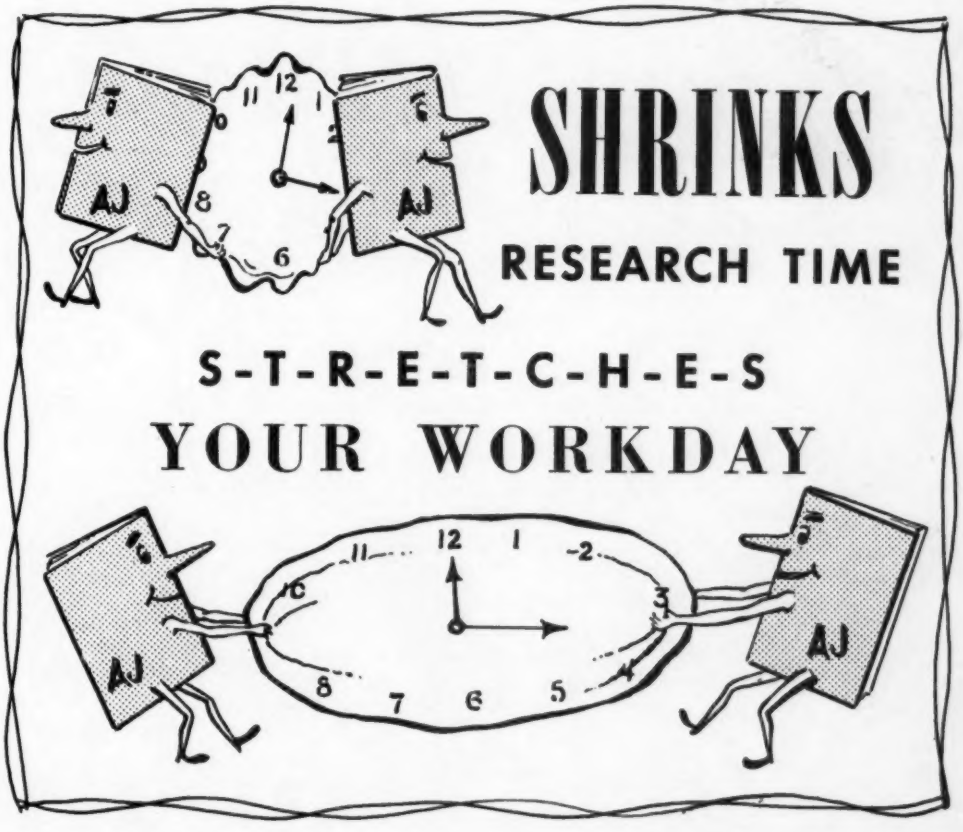

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